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Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-4

In the Matter of

Reexamination of the Effective
Competition Standard for the
Regulation of Cable Television
Basic Service Rates

NOTICE OF PROPOSED RULE MAKING

Adopted: January 11, 1990; Released: January 22, 1990

By the Commission:

I. INTRODUCTION

1. By this *Notice of Proposed Rule Making* (*Notice*), the Commission seeks to reexamine the rules regarding the regulation of basic cable service rates. In 1985, as part of its implementation of the Cable Communications Policy Act of 1984, the Commission adopted a "three signal standard" for determining whether cable systems were subject to "effective competition" and thus not subject to regulation of their basic service rates by the local franchising authority.[1] We now believe that changed circumstances in the video marketplace warrant review of the three signal standard. Accordingly, this *Notice* reexamines whether the premises for the 1985 action are valid today and, if reforms are needed, what changes might be appropriate.

II. BACKGROUND

2. The Cable Communications Policy Act of 1984 (Cable Act) was signed into law on October 30, 1984.[2] Reflecting a national policy to encourage the growth and development of cable television services, the Cable Act set forth guidelines to govern federal, state, and local authorities' regulation of cable systems. The Cable Act also sought to assure that cable systems provide the widest possible diversity of information sources and services to the public, and that they are responsive to the needs and interests of the local communities they serve. Congress intended the Cable Act to promote competition in cable communications and, to achieve this objective, sought to minimize unnecessary regulation that would impose an undue economic burden on cable systems. Consistent with this approach, the Cable Act contained provisions regarding the regulation of basic cable service rates by local franchising authorities, restrictions on the ownership of cable systems, requirements that channels be reserved for commercial access use, authority for cities to require public, educational and governmental access channels and the establishment of equal employment opportunity programs. In this *Notice*, we focus upon those provisions of the Cable Act regarding the regulation of basic cable service rates.

3. Prior to enactment of the Cable Act, a cable system was generally authorized to provide services through a franchising agreement with the local government in its service area. In most states this agreement also permitted the franchising authority to regulate basic service rate increases. The Cable Act preserved the power of franchising authorities to regulate basic cable service rates only in those situations where the cable system is not subject to "effective competition." [3] The Cable Act directed the Commission to define the circumstances in which a cable system is not subject to effective competition and to establish standards for rate regulation in such situations.[4]

4. As discussed further below, the Commission adopted such a standard in April 1985, within the 180 day timeframe specified in Section 623 of the Cable Act. In addition to requiring that the Commission define effective competition, the Cable Act also: 1) provides that the Commission shall, not later than six years after its enactment, "prepare and submit to the Congress a report regarding rate regulation of cable services, including such legislative recommendations as the Commission considers appropriate,"[5] and 2) "periodically review" its regulations relating to rate regulation and the effective competition standard "taking into account developments in technology."[6]

5. In a separate *Notice of Inquiry* proceeding,[7] we have commenced the process of gathering the information and public comment that will provide the basis of our six year report to Congress. We are also, as part of that process, working with the General Accounting Office on a survey of rate changes following adoption of the Cable Act. Through this *Notice* we are commencing the periodic review of our "effective competition" and other rate regulation rules. Although these proceedings have different objectives, one looking toward broad legislative recommendations and the other toward changes in specific Commission rules, there is a considerable overlapping of subject matter between the two. By proceeding on these two parallel tracks, we hope to effect any appropriate changes in cable regulation as expeditiously as possible. Parties should be aware that in reaching a conclusion in this docket we will inevitably have before us the filings in the broader six year inquiry proceeding as well. To avoid duplicative filings, parties may wish simply to cross-reference in this proceeding comments that may already have been filed in response to the *Notice of Inquiry* in MM Docket No. 89-600.

III. DISCUSSION

A. *Effective Competition*

1. *Definition of Effective Competition*

6. *Requirements of Section 623 of the Cable Act.* Section 623(b) of the Cable Act requires the Commission to define the circumstances under which a cable system is not subject to effective competition and to establish standards for regulation of rates charged for basic cable service where effective competition does not exist.[8] It is only under such circumstances that the Cable Act authorizes a franchising authority to regulate even basic cable service rates. The legislative history states that the Commission's

definition of effective competition should establish objective nationwide criteria which are readily applicable on a community-by-community basis.[9] It further indicates that in determining whether a cable system is subject to effective competition, the Commission should consider the number, nature and price of services cable provides, compared with the number, nature and price of services available from alternative sources.[10] It also suggests that, in addition to the number of over-the-air broadcast stations in a market, factors such as the subscriber penetration rate of the cable system may be relevant.[11]

7. Other provisions of Section 623 of the Cable Act allow cable operators to deem any rate increase request subject to franchising authority approval to be granted if that authority fails to act within 180 days of such request.[12] Moreover, cable operators whose basic service tiers are subject to rate regulation may automatically increase these rates up to 5 percent annually in most instances without franchising authority approval.[13] Section 623(f) states that nothing in the Cable Act prohibits any Federal agency, State or franchising authority from prohibiting discrimination among customers of basic service.

8. *FCC Rules Implementing Section 623.* On December 4, 1984, the Commission adopted a *Notice of Proposed Rule Making* proposing rules to implement the Cable Act.[14] With respect to the definition of effective competition, the Commission sought comment on what constitutes effective competition and what kinds of signals or services compete with basic cable service. The Commission requested comment on defining effective competition in terms of the availability of off-the-air television signals in the cable system's community and suggested that the presence of four unduplicated signals, including the three major networks, might be an appropriate choice. The Commission also indicated that the use of predicted Grade B contours might be a more appropriate criterion for determining availability of a signal than one based on a specific mileage zone or the must carry rules that were in effect at that time. Comment also was sought on whether a cable penetration level should be included in the definition.

9. On the basis of the comments received, a Staff Study[15] and the economic literature, the Commission *Report and Order* in MM Docket No. 84-1296 (adopted April 11, 1985) determined that effective competition for a cable system exists where three off-the-air broadcast signals were available in the cable community.[16] The Commission stated that a broadcast television signal would be considered available if: (1) the signal placed a predicted Grade B contour over any portion of the cable community, or (2) the signal was "significantly viewed," as that term is defined in the rules.[17]

10. The Commission at that time decided to base the criteria for determining effective competition on the availability of off-air television signals. Given the fact that the basic tier was at that time composed primarily of retransmitted broadcast signals, the Commission believed then that some amount of locally-available broadcast programming provided effective competition to the services then typically offered as basic cable service. At that time, the Commission also found that the services provided by alternative video distribution technologies, such as multichannel multipoint distribution systems (MMDS), direct broadcast satellites (DBS) or video cassette recorders (VCRs), compete most directly with nonbasic cable services, which are not subject to rate regulation. Although the Commission initially proposed to define effective competition as being the availability of four television signals off-air, the record in that proceeding indicated that three broadcast signals would be sufficient to allow viewers adequate and significant programming choices and to ensure that the basic tier offering did not become a source of undue market power for the cable operator. This conclusion also was supported by a Staff Study that analyzed two, three, four and five signal markets using Arbitron viewing data.[18]

11. *Modification of standard in response to the ACLU decision.* Several elements of the Commission's rules implementing the rate regulation provisions of the Cable Act were modified in response to the decision of the U.S. Court of Appeals for the District of Columbia Circuit in *American Civil Liberties Union v. FCC (ACLU).* [19] In that decision, the court concluded that the rate regulation rules were, for the most part, consistent with the law. While the court found that the Commission's definition of effective competition was reasonable, and it therefore affirmed the use of a three-signal criterion, it ruled that the standard for measuring signal availability was arbitrary and capricious. Thus, it remanded that issue to the Commission for a reasoned explanation of the chosen standard for determining signal availability or the development of a new signal availability standard.[20]

12. In response to the *ACLU* decision, the Commission adopted a *Further Notice of Proposed Rule Making* proposing changes to the procedures for determining signal availability.[21] On the basis of that record, the Commission amended the signal availability standard.[22] Under the revised rules, a cable system is currently considered to be subject to effective competition if the entire community it serves can receive three or more unduplicated broadcast television signals. It is not necessary, however, that the same three signals serve the entire community. In order to reflect signal availability in the cable community, the modified rules require that a determination of a signal's significantly viewed status for this purpose be based on viewership data from the cable community. As stated previously, the Commission also modified its rules to require that the signals in question encompass the entire cable community, rather than simply a portion of it, with their Grade B contours. The Commission believed that this revised approach would satisfy the court's concerns, yet provide a methodology that would be inexpensive and easy for cable operators and franchising authorities to implement. Furthermore, the revised standard is intended to assure that off-the-air signals are generally available in communities in which they are found to provide effective competition to basic cable television service.

2. *Changed Circumstances*

13. Section 623(b)(3) of the Cable Act requires that the Commission periodically review its standards for rate regulation. This section specifically provides that the Commission take into account developments in technology and permits the Commission to amend its regulations to the extent the Commission deems necessary. In reviewing these regulations, the court, in *ACLU*, also emphasized the need for the Commission to review the effects of its regulations. The court said:

> In light of the speed with which the FCC was compelled to act, and the statutory command that the Commission "periodically review" [footnote

> omitted] its rate regulation rules, we wish to make clear that we fully anticipate that the Commission will carefully monitor the effects of its regulations and make adjustments where circumstances so require.[23]

We now believe the time has come to commence such review.

14. The record evidence upon which the Commission relied to develop the "three signal" standard in 1985 was based on information gathered in 1984, and often reflected data relating to even earlier time periods. In particular, the Staff Study used data reflecting viewership patterns in late 1981 and early 1982. In the ensuing years, the cable industry has undergone rapid changes, in both structure and conduct, which have fundamentally altered the nature of "basic cable service." These changes in turn appear to call the continued validity of the "three signal" standard into serious question. We discuss these changes below.

15. The fundamental change that has occurred is that the number of channels now generally offered on the basic tier has increased. Cable operators are including more program choices on the lowest level basic tiers, including a larger number of non-broadcast program channels (*e.g.*, the Discovery Channel, MTV, CNN, USA, ESPN, etc.). The results of this basic tier expansion have been reflected in a recent General Accounting Office (GAO) survey of cable systems.[24] The study shows that, between December 1986 and October 1988, the average number of basic channels offered increased from 24 to 30 on the lowest priced basic service tier and increased from 27 to 32 on the most popular basic cable service tier. The makeup of the basic tier has changed from principally offering retransmitted local broadcast television signals and some locally originated programming to a menu that now includes cable networks, superstations and other services beyond local broadcast stations.

16. One major reason that basic tier expansion occurred after adoption of the Cable Act is not difficult to discern. Prior to the enactment of the Cable Act, rates for basic tier cable service were generally subjected to local rate regulation, while higher tiers were not. Thus, cable operators had an incentive to shift programming to higher, unregulated tiers of pay programming service to maximize their pricing freedom and net revenue. With rate deregulation, however, cable operators have an incentive to shift programming to the basic tier(s) to make that service more attractive to the consumer in order to increase their level of subscribers. This basic tier expansion appears to be an especially common marketing tool as cable penetration increases and a larger array of programming options becomes important in attracting new subscribers in areas where cable service has existed for some time. In other words, cable operators are attempting to increase the demand for their basic service by making it a product distinguishable from local broadcast television.

17. Thus, while three off-the-air broadcast television signals may have been an appropriate measure of effective competition when the basic service tier consisted primarily of retransmissions of signals available over-the-air, local broadcast television signals may no longer be a good substitute for the full range of programming and other services now distributed by cable television systems on their basic tiers. This tentative conclusion appears to be reinforced by the fact that, since the deregulation of rates under the existing effective competition standard occurred, rates for basic cable service have increased substantially while subscribership has also increased. This apparent inelasticity of demand for cable suggests that alternatives to cable are limited. We note that the GAO study reports that from December 1986 to October 1988, the average monthly rates for the lowest priced basic service tier increased by 29 percent and the monthly rate for the most popular basic service tier increased by 26 percent. We seek comment on the extent to which basic tier expansion has occurred and the extent to which it has undermined the validity of our three signal standard.

18. We note that while the shifting of non-broadcast programming may affect the basis for our three-signal effective competition standard, it does not alter the statutory definition of basic service in the Cable Act or our jurisdiction to provide for rate regulation of such basic service in the absence of effective competition. Basic cable service means " *any* service tier which includes the retransmission of local television broadcast signals,"[25] regardless of whether non-broadcast services are also included.[26] In its definition of basic service, Congress contemplated that the basic tier would include signals other than local broadcast television signals, and that these other signals may appropriately be rate regulated along with the local signals.[27]

19. The Commission's determination that three broadcast television signals comprised effective competition for basic cable service was based in part on the Staff Study. The Commission staff recently updated the study using 1988 data and found that the revised results do not appear to support the three signal standard for effective competition.[28] The 1985 Staff Study investigated the potential market power of a cable operator in those areas where there are few local broadcast signals (*i.e.*, 2, 3, 4 and 5 station markets). For each sampled county, we compared the audience share of programming only available to cable subscribers and most likely to be included on the basic service tier (*i. e.*, broadcast signals from neighboring television markets, distant signals, including those that are satellite delivered, and other (non-pay) cable programming, such as ESPN and CNN) to the off-air viewership of a local station. The premise of the study was that undue market power for the cable operator might be indicated where the viewership share of programming available only to basic cable subscribers was as large or larger than the off-air viewership of a local station. In 1985, the staff found this to be the case when the comparison was made for two station markets. In three station markets, the data showed that cable viewership of such basic programming was in general less than the off-air viewership of a single local signal. Thus, the existence of basic cable service appeared to be comparable to adding one more competitor to a three competitor market. On this basis, we concluded that the existence of three or more off-the-air broadcast signals in the cable market provided an effective constraint on the market power of a cable system in the provision of basic service. The revised study, however, does not appear to support this conclusion. In particular, it shows that in three station markets the cable viewership of such basic programming has, in general, increased and now accounts for a larger viewing share than does the off-air viewership of the typical local signal. Thus, changes in viewing patterns appear to in-

dicate that the three signal effective competition standard is no longer appropriate for determining situations when a cable operator is subject to effective competition.

3. *Proposals*

20. In light of the basic tier expansion that has occurred since the enactment of the Cable Act and the fact that this Commission has jurisdiction under the Cable Act to redefine "effective competition" and thus require corresponding changes in the regulation of this new "basic cable service," we believe it is now appropriate to review our existing effective competition standard and consider whether to modify or replace it. In the following section, we propose a number of alternative ways to measure effective competition. We now ask interested parties for their comments on whether the existing standard remains valid, or whether the alternatives listed below or other alternatives, either singly or in combination, would provide a more accurate determination of effective competition.

21. *Available Over - the - Air Signals.* For the reasons stated above, it is our view that the current three signal standard may no longer provide an accurate measure of effective competition for today's basic cable service. One obvious alternative is to enlarge the complement of available over-the-air signals constituting effective competition to four or more. To do so, however, presumes that today's basic cable service subscriber chooses basic cable service primarily to get better reception of local television signals rather than to receive cable programming not otherwise locally available on broadcast television. As an initial matter, we ask commenters to address the issue of why subscribers today subscribe to basic cable service and relate this observation to whether an effective competition standard premised solely on some number of locally available broadcast signals would constrain cable system operators from the exercise of undue market power.

22. Assuming *arguendo* that some increase in the number of over-the-air signals would be adequate to define effective competition, commenters are also asked to address what number of signals would suffice and why. We ask commenters urging adoption of this standard (or any other specific standard) to provide hard evidence to support their proposed signal standard.

23. Our existing standard does not differentiate among station types (*i.e.*, network affiliate, independents, noncommercial). It permits television translator stations to be counted for effective competition, but not low power stations. We seek comment on whether these provisions should be modified and, if so, how. For example, should a new effective competition standard premised on four or more locally-available broadcast signals require the existence of some combination of signals which includes network stations, independent and noncommercial stations?

24. The existing effective competition standard determines signal availability on the basis of the signal's predicted Grade B contour, or its status as significantly viewed in the cable community.[29] We seek comment, particularly from those asserting a continuation or expansion of the current definition, whether these or other measures, such as a 35-mile zone, would be appropriate measures for determining signal availability in an effective competition standard based on a specific number of off-air signals.

25. *Alternative Delivery Systems.* As discussed previously, the number and variety of cable networks on the basic tier has increased subsequent to enactment of the Cable Act. This development may in turn have rendered off-the-air signals, whatever their number in a given community, inadequate substitutes for the basic cable tier. We solicit comment on what types of video services in fact provide effective competition to basic cable service. Clearly, a second cable system would provide effective competition to an existing cable system assuming it were able to obtain fair access to programming. Is a second cable system the only true measure of "effective competition"?[30] We also ask whether, and under what conditions, other video distribution technologies, such as MMDS, satellite master antenna systems (SMATVs), DBS, and home satellite dishes (HSDs), can also provide effective competition to the local cable system,[31] as well as the degree to which the absence of such systems are indicative of the absence of effective competition.

26. Another factor that led us to adopt an off-the-air signal standard was the relative ease with which the number of such signals serving a cable community can be determined. At this time MMDS, SMATV and HSD offer only limited competition to cable and the first DBS satellite has yet to be launched. We recognize that the existence of an alternative distribution technology may not be sufficient to provide effective competition if it is only available in a small portion of the cable community, or certain factors lead few consumers actually to subscribe to it. We, therefore, seek comment on how to incorporate the availability of these services in an effective competition standard. For example, if MMDS were to be included in the effective competition standard, should we require a certain minimum reach in the cable community,[32] or minimum level of penetration, and should this be based upon some number of years the competing service has been available. For example, would a 10 or 20 percent subscriber penetration of homes for which MMDS is available be sufficient to count MMDS as an effective competitor to local cable service? In this regard, we would note that viewership of MMDS may be limited because MMDS signals are subject to terrain shielding and obstructions that limit its availability to all households in an MMDS system's service area. How do these possible reception problems limit MMDS' effectiveness as an actual competitor to cable service?

27. If we were to include SMATVs or HSDs among competitors to local cable systems, there is the problem of how we would determine their availability to local consumers. To the best of our knowledge, there are no readily available data regarding the number of households having SMATVs or HSDs on a community-by-community basis. Commenters are asked to address the question of how we can count SMATV or HSD availability for effective competition purposes.

28. With respect to DBS, we observe that it is not available to any American consumers today. Given that fact, at this time should we take DBS into account at all as a potential competitor to cable service?

29. *Cable Penetration.* In 1985, the Commission considered including some measurement of cable penetration in the effective competition standard. The Staff Study evaluated whether high cable penetration could be a reliable indicator of undue cable market power, and concluded that there appeared to be no direct correlation between high penetration rates and small numbers of over-the-air

signals. In the *Report and Order*, the Commission concluded that it was unconvinced that cable penetration statistics are reliable indicators of broadcast reception problems. The updated study reaches the same conclusion. We are aware, however, that many parties continue to believe that high cable penetration is a measure of cable market power, and we recognize that there is a certain intuitive appeal to that position. We seek comment, therefore, on how we could distinguish between high penetration as an indication of undue market power and high penetration as an indication of the provision of a valuable service in a nevertheless generally competitive market. We note that if we were to establish some level of cable penetration as being an indicator of undue market power, we might give cable operators incentives to keep subscribership just below the cut-off. Is there a way we might mitigate this adverse effect of using cable penetration as an indicator of undue cable market power?

30. *Provision of Cable Service on an Unbundled Basis.* Cable operators now offer programming on the basic tier as a package or "bundle." Cable operators could, theoretically, offer the channels now available on the basic tier individually (*i.e.*, on a per-channel basis). Such a marketing scheme would afford consumers greater choice in their purchase of cable service because it would permit them to purchase only those channels they specifically desire rather than a tier of service that includes signals they may not want. We seek comment on whether we should determine that effective competition exists if all subscribers in the cable community can purchase cable service on a per-channel basis. Or would effective competition still be absent and regulation needed unless there were some additional competition from other multichannel delivery systems or program packages?[33] We also request comment on whether we have the statutory authority to encourage or even require cable operators to offer programming services on an unbundled basis.

31. *Combination of Off - Air and Other Video Services.* It may also be any one of the measures discussed above cannot, in isolation, ensure effective competition. For this reason, we also wish to examine standards that would combine two or more of the proposals discussed above. We note that both the U.S. Department of Justice and the National League of Cities urged such an approach in their comments filed in response to the 1984 *Notice of Proposed Rule Making* in MM Docket No. 84-1296.

32. In its comments, the Department of Justice proposed that the Commission adopt an effective competition standard that requires that a cable system meet two of the following criteria to be subject to effective competition: 1) the availability of at least five unduplicated broadcast stations, including affiliates of the three national broadcast networks; 2) the total number of basic service channels is less that three times the number of locally available broadcast signals; 3) no more than 20 percent of the cable system's subscribers are "basic only" subscribers as of the date of enactment of the Cable Act. We seek comment on whether this or some other related multiple-part standard might be appropriate.

33. The National League of Cities offered a similar standard. It proposed that a franchising authority be permitted to regulate rates if: 1) the community is served by fewer than five over-the-air television broadcast stations (or is not served by an affiliate of each of the three major television networks, a commercial independent, or a public broadcasting station); 2) the community is not served by an economically viable multichannel distribution system (*e.g.*, DBS, MMDS); or 3) the cable system has attained a penetration rate of 70 percent. Again, we seek comment on this or other similar standards.

34. There are other combinations that might also improve upon our current effective competition standard in identifying those cable systems with undue market power. For example, it might be appropriate to consider over-the-air broadcast signals and the availability of MMDS or SMATV in combination. If we were to adopt an effective competition standard that took into account the presence of an MMDS or SMATV competitor, it might still be true that the presence of a particularly large number of local broadcast signals could provide effective competition even in the absence of such alternative services. We could require that a certain minimum number of signals must be available in most or all of the local community to prove the existence of effective competition and any signals (*i.e.*, broadcast or MMDS) would count toward meeting this standard. We seek comment on these as well as other possible combinations of proposed standards for determining whether a cable system is subject to effective competition.

B. *Standards for Rate Regulation*

1. *Existing Standards*

35. Section 623(b)(2)(B) of the Cable Act also requires that the Commission establish standards to govern the local franchising authority's regulation of basic cable service rates. The Commission has adopted a set of administrative procedures that franchising authorities must use in setting rates. Franchising authorities are required to provide: (1) formal notice of a rate standard (or change thereof) to the public; (2) opportunities for interested parties to make their views known; and (3) a formal statement to the public when a decision on a rate matter is made. With respect to the substance of the rate-making decision, the Commission concluded that the appropriate regulated rate is best determined by the local franchising authority consistent with the statute.[34]

2. *Proposals*

36. At this time, the Commission has imposed only administrative procedures for local rate regulation. We propose to retain these existing procedural requirements. We seek comment on this proposal and on whether we should impose any additional standards. We discuss several options below. We invite parties to comment on these proposals and will also consider commenting parties' proposals of substantive rules, additional procedural rules or a combination of both.[35] In particular, we are interested in proposed standards that could avoid repetition of some municipalities' reported abuses of the franchise power.

37. The Commission could assist local franchising authorities' efforts to regulate basic service rates by requiring cable systems to adopt accounting standards that would enable franchising authorities to identify the cable operators' costs and realized rate of return. Prior to cable deregulation, the Commission had considered creating a uniform reporting and accounting system for cable television systems.[36] We could consider requiring, for example, that cable systems implement uniform systems of accounts similar to Part 32 of the Commission's rules that now apply to telephone companies. However, a question arises

as to whether the benefits of establishing such detailed standards would exceed the costs to us and the parties directly affected by such standards. We seek comment on these proposals.

38. The Commission might also assist local authorities by reinstituting and making publicly available the financial reporting system in place prior to 1983.[37] These forms required cable systems to provide the Commission with financial information concerning: operating revenues and expenses, payments to pay cable program suppliers, depreciation, amortization, other income, current assets, fixed assets, other assets, current liabilities, deferred credits, long term debt, and owner's equity. However, a question arises as to whether collection of such information would greatly benefit local franchising authorities. We seek comment on this proposal.

39. The Commission could also require a specific rate making methodology to be used by franchising authorities in regulating basic service rates. The Commission previously considered and rejected traditional rate of return regulation.[38] Use of conventional rate of return regulation raises issues relating to rate base calculations, permissible rates of return, depreciation schedules, uniform systems of accounts and financial information reporting systems, debt/equity ratios, cost allocation mechanisms, and intercorporate transaction rules. We continue to believe that conventional rate of return regulation has a number of drawbacks that would appear to be equally applicable in the cable television context.[39] This method of regulation is not only administratively cumbersome but, because it interferes with incentives to operate efficiently, may also fail over the long run to assure consumers the lowest reasonable rates for the services to which they subscribe. We seek comment on these tentative conclusions. To the extent parties believe that this type of regulation may be necessary and that federal standards would be useful, they should provide detailed comments as to the nature and content of such standards.

40. We also believe that alternative forms of rate control, including incentive regulation such as "price caps," warrant comment and analysis. In general, such regulation operates by placing limits on the rate a cable system may charge for basic cable service. The price limits may be related to such factors as the inflation rate (*i.e.*, Consumer Price Index), known changes in input costs (*e.g.*, programming), and productivity gains. Pricing limitations offer consumers strong protection against attempted exercises of undue market power. Consumers may benefit because the price caps method of regulation would give cable systems incentives to avoid unnecessary costs, invest in efficiency-enhancing technology, and employ innovative service approaches in order to increase earnings, rather than incentives to pad costs and to cross-subsidize certain services. This system may be less complex than rate of return regulation and easier to administer, which should reduce the cost of regulation. We seek comment on these tentative conclusions. We thus seek comment on whether the Commission should require a "price caps" rate making methodology to be used by franchising authorities in regulating basic service rates, and what the details of any such system would be. We note that any rate increase in basic service rates that cable systems might obtain under a "price caps" regulation approach would be in addition to the five percent annual increase in the regulated basic service rates to which they are entitled under Section 623(e)(1) of the Cable Act. Accordingly, it may not be appropriate, in this instance, to include an inflation factor. Therefore, we further request comment from those parties favoring the use of "price caps" regulation regarding the relevant factors for adjusting the price limits.

C. *Additional Matters*

41. *Implementation of the Rules.* If we modify the existing effective competition standard, it may not always be readily apparent whether a cable system is subject to effective competition. We note, in this regard, that even under our existing effective competition standard this may be true. Under certain circumstances, a cable system may be required to submit to the Commission a special viewership study to establish that it meets the three signal standard, and a franchising authority is required, under certain circumstances, to submit to the Commission a special engineering study to establish that the cable system in its community does not meet the three signal standard. If the effective competition standard is modified to include, for example, a cable penetration rate or the availability of another provider of multiple video services in the local community, we may require, in some instances, that cable systems or franchising authorities submit data or other evidence to us to establish whether the cable system meets the effective competition standard.[40] Section 76.33(c) of the Commission's rules now permits any party seeking to establish either the presence or absence of effective competition to petition the Commission in accordance with the provisions and procedures set forth in Section 76.7 of the Commission's rules on special relief. We propose to retain this section of the rules. Furthermore, in order to avoid disruption following adoption of any new effective competition standard, we propose that franchising authorities be delegated in the first instance the authority to determine whether a cable system whose rates for basic service are currently not regulated would qualify for regulation under our new standard, with this Commission's processes available in the event the cable system operator, or any other interested party, disagrees with the determination.[41] We seek comment on these proposals.

42. *Transition Period.* The Cable Act delayed for two years the effective date of the new competition standard for determining rate regulation of basic cable service rates for existing cable systems. When the Commission modified the signal availability measures in response to the decision in *ACLU*,[42] it delayed full implementation of the new rules for a period of six months from the release date of the *Second Report and Order*. The Commission stated that this delay was necessary in order to allow time for preparation of any special studies needed to prove the existence or absence of effective competition, and for completion of review under the Paperwork Reduction Act of 1980. We seek comment on whether we should also delay the implementation of any new rules that we may adopt herein for some length of time, and, if so, for what period of time.

43. The practical effect of the Commission's three signal standard has been to prevent most cable systems from being subject to regulation of basic rates.[43] Any new rules we may adopt in this *Notice* would likely authorize more franchising authorities to regulate the basic service rates of their local cable television systems. We seek comment on the likelihood that cable systems would engage in strategic behavior before the effective date of any new

regulatory scheme to defeat its intended effect. For example, cable operators whose basic cable service rates are not now regulated can raise these rates before the new effective competition standard goes into effect. The Cable Act does not appear to give franchising authorities the right to require roll-backs (and refunds) of rate increases taken when basic service rates were not subject to regulation. Furthermore, the Communications Act does not appear to give this Commission authority to intervene with respect to roll-backs or refunds. Is there any legal basis under which franchising authorities or the Commission could have the right to require such roll-backs? What, if anything, can or should the Commission or franchising authorities do to minimize any adverse effects of these rate increases?

44. Furthermore, we note that the Cable Act gives cable operators complete freedom to retier their services among their unregulated tiers.[44] Cable operators subject to regulation of their basic service rates may also modify the basic service tier(s) subject, however, to certain limitations associated with the franchise process.[45] Since the deregulation of rates under the existing effective competition standard occurred, cable operators have endeavored to increase the attractiveness of their service by increasing the number and variety of signals available on their basic tiers. Cable operators whose basic cable service rates are not now regulated would be able to retier non-local signals and other cable programming services out of basic service (*i.e.*, they could reverse tier expansion) before the new effective competition standard goes into effect. In this way, cable operators could limit the number of cable channels subject to rate regulation to the local, off-the-air signals. Franchising authorities would then be limited to regulating a basic service tier analgous to the tier as it was configured prior to the Cable Act. We seek comment on whether this outcome serves the public interest. The enlarged basic service tiers now in existence appear to reflect, in part, the cable industry's response, in an unregulated environment, to subscriber preferences. Accordingly, we seek comment on whether the purpose of the Cable Act provisions respecting the regulation of basic service rates would be undermined if the basic tiers contained only signals available off-the-air. We also seek comment on whether we have authority to and, if so, should require that the basic service tiers that will become subject to rate regulation under any new effective competition standard we may adopt in this proceeding must include all previously carried services (*e.g.*, those carried on the adoption date of this *Notice* or some other specified date).

IV. CONCLUSION

45. In light of the changes that have occurred in the video marketplace since we adopted standards for the regulation of basic cable service rates in 1985, we believe that it is now appropriate to reexamine the rules regarding this matter. The fundamental change that has occurred is that the number of channels now generally offered on the basic tier has increased. As a result of this basic tier expansion, the makeup of the basic tier has changed from principally offering retransmitted local broadcast television signals to a menu that now includes a fuller range of programming services. We also note that the increases in basic service rates that have been recently reported may indicate that cable systems have a greater degree of market power than was indicated by the 1985 Staff Study. Therefore, the existing three signal standard may no longer be appropriate for determining when a cable system is subject to effective competition. In this *Notice of Proposed Rule Making*, we discuss a wide variety of alternatives to the existing rules. We seek comment on these proposals. In addition, parties are encouraged to suggest any other readily applicable alternatives for ensuring that franchising authorities are permitted to regulate basic cable service rates where effective competition does not exist.

V. ADMINISTRATIVE MATTERS

46. As required by Section 603 of the Regulatory Flexibility Act, the FCC has prepared an initial regulatory flexibility analysis (IRFA) of the expected impact of these proposed policies and rules on small entities. The IRFA is set forth in the Appendix. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the *Notice*, but they must have a separate and distinct heading designating them as responses to the regulatory flexibility analysis. The Secretary shall cause a copy of this *Notice*, including the initial regulatory flexibility analysis, to be sent to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq.* (1981).

47. The proposals contained herein have been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose a new or modified requirement or burden upon the public. Implementation of any new or modified requirement or burden will be subject to approval by the Office of Management and Budget as prescribed by the Act.

48. For purposes of this non-restricted notice and comment rule making proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period. *See generally* Section 1.1206(a). The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. Section 1.1202(f). During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by the Commission or staff for the clarification or adduction of evidence or the resolution of issues in the proceeding. Section 1.1203.

49. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding, or (2), if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. Section 1.1202(b). Any person who makes or submits a written *ex parte* presentation shall provide on the same day it is submitted two copies of same under separate cover to the Commission's Secretary for inclusion in the public record. The presentation (as well as any

transmittal letter) must clearly indicate on its face the docket number of the particular proceeding(s) to which it relates and the fact that two copies of it have been submitted to the Secretary, and must be labeled or captioned as an *ex parte* presentation.

50. Any person who in making an oral *ex parte* presentation presents data or arguments not already reflected in that person's written comments, memoranda, or other previous filings in that proceeding shall provide on the day of the oral presentation an original and one copy of a written memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. The memorandum (as well as any transmittal letter) must clearly indicate on its face the docket number of the particular proceeding and the fact that an original and one copy of it have been submitted to the Secretary, and must be labeled or captioned as an *ex parte* presentation, Section 1.1206.

51. Pursuant to applicable procedures set forth in 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before April 6, 1990, and reply comments on or before May 7, 1990. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

52. Authority for this action is contained in Sections 4(i), 303 and 543(b)(3) of the Communications Act of 1934, as amended.

53. For further information on this proceeding, contact Marcia Glauberman, Policy and Rules Division, Mass Media Bureau, (202) 632-6302.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Initial Regulatory Flexibility Act Analysis

Pursuant to the Regulatory Flexibility Act of 1980, the Commission finds:

I. Reason for action. The Cable Communications Policy Act of 1984 requires the Commission to periodically review its rules regarding the regulation of basic cable service rates. An analysis of changes in the video marketplace since these rules were adopted in 1985 leads us to believe that this is an appropriate time to reexamine the "effective competition" standard and to consider revisions to them.

II. Objectives. To consider alternative definitions for "effective competition" and modifications to the standards for rate regulation to ensure that local franchising authorities are permitted to regulate basic cable rates in situations where a cable system has significant market power. We also desire to adopt rules that will be easily interpreted and readily applicable and, whenever possible, minimize the regulatory burden on affected parties.

III. Legal basis. Action as proposed for this rule making is contained in Sections 4(i), 303 and 543(b)(3) of the Communications Act of 1934, as amended.

IV. Description, potential impact and number of small entities affected. Depending on the action taken as a result of this proceeding, additional cable television systems could be subject to rate regulation of their basic cable service by their franchising authorities. However, as these cable systems may or may not be rate regulated, at the discretion of the franchising authority, we are unable to estimate the number of cable systems that would be affected by any of the proposals discussed in the *Notice of Proposed Rule Making*.

V. Reporting, record keeping and other compliance requirements: The proposals under consideration in this *Notice of Proposed Rule Making* include the possibility of new reporting and record keeping requirements for cable systems.

VI. Federal rules which overlap, duplicate or conflict with this rule: None.

VII. Any significant alternatives minimizing impact on small entities and consistent with stated objectives: None.

FOOTNOTES

[1] *Report and Order* in MM Docket No. 84-1296, 50 FR 18637 (1985).

[2] Cable Communications Policy Act of 1984, Pub.L. No. 98-549, §1 *et seq.*, 98 Stat. 2779 (1984).

[3] *See* 47 U.S.C. §§543(b)(1), 543(c).

[4] *See* 47 U.S.C. §§543(b)(2)(A) and (B).

[5] Section 623(h), 47 U.S.C. §543(h).

[6] Section 623(b)(3), 47 U.S.C. §543(b)(3).

[7] MM Docket No. 89-600, FCC 89-345, adopted December 12, 1989.

[8] "Basic cable service" is defined in the Cable Act as "any service tier which includes the retransmission of local television broadcast signals." 47 U.S.C. §522(2)(1984).

[9] *See* House Committee on Energy and Commerce, H.R. Rep. No. 934, 98th Cong., 2nd Sess. (1984) (hereinafter *House Report*) at 66.

[10] *Id.*

[11] *Id.*

[12] 47 U.S.C. §543(d).

[13] 47 U.S.C. §543(e)(1).

[14] *See Notice of Proposed Rule Making* in MM Docket No. 84-1296, 49 FR 48765 (1984).

[15] The Staff Study was placed in the record of MM Docket No. 84-1296. It is discussed below.

[16] *See Report and Order* in MM Docket No. 84-1296, 50 FR 18637 (1985).

[17] *See* 47 CFR §76.5(i), formerly 47 CFR §76.5(k), and 47 CFR §76.54.

[18] We note that the standard adopted by the Commission established a presumption that effective competition exists, *e.g.*, where the predicted Grade B contour of three television stations encompassed any portion of the community in question. (Signals may also be counted for effective competition purposes if they are significantly viewed.) Nevertheless, the rules provide an opportunity for franchising authorities to demonstrate that such signals are in fact not receivable anywhere within the cable community, and thus that effective competition does not actually exist.

[19] 823 F.2d 1554 (D.C. Cir. 1987), *cert. denied*, 108 S. Ct. 1220 (1988).

[20] In particular, the Court faulted the Commission for not discussing why the "any portion" standard was selected over a more refined geographic area. 823 F.2d at 1571-1573.

[21] *See Further Notice of Proposed Rule Making* in MM Docket No. 84-1296, 2 FCC Rcd 5888 (1987).

[22] *See Second Report and Order* in MM Docket No. 84-1296, 3 FCC Rcd 2617 (1988). Two petitions for reconsideration of this action were filed and one was subsequently withdrawn. The remaining petition, addressing a relatively narrow aspect of the existing rules, will be addressed separately.

[23] 823 F.2d at 1565.

[24] *See* U.S. General Accounting Office, *Telecommunications: National Survey of Cable Television Rates and Services* (GAO Survey), August 1989.

[25] 47 U.S.C. §522(2).

[26] *See ACLU v. FCC*, 823 F.2d at 1566. The court noted that this definition "speaks with crystalline clarity" and the Commission has no discretion to alter it. *Id.* at 1567-68.

[27] *See House Report*, *supra*, at 40.

[28] The original Staff Study, *Alternative Criteria for Defining Effective Competition: A Statistical Analysis of Small Cable Markets*, and the update have been placed in this docket for comment.

[29] Section 76.33(a)(3) of the rules provides a waiver procedure wherein a franchising authority or cable operator may submit engineering or other studies that show that such Grade B level signals are (or are not) available within the community. The waiver process is an important part of the effective competition standard because interference problems may make off-air viewing, either with an A/B switch or another television set, an infeasible alternative. (An A/B switch allows the viewer to switch his television back and forth between his cable system and an outdoor or other antenna.)

[30] More fundamentally, in the future, when fiber optic cable becomes more widely available, it may be possible for consumers to choose their cable service from among several competing service providers. We seek comment on whether we should find, in such cases, that effective competition exists.

[31] MMDS is a service which uses omnidirectional microwave signals to deliver video programs to subscribers. There are relatively few operations currently in service. DBS is generally understood to apply to a generation of high-powered satellites which are intended to transmit programming to large audiences via inexpensive home receivers. This service has been approved by the Commission but has yet to become operational. HSDs are relatively expensive home receivers that permit the consumer to receive existing satellite broadcasts. HSDs are now in use in over 2.5 million homes, according to the Satellite Broadcasting and Communications Association of America (cited in the *Washington Post*, December 13, 1989, at A20). SMATVs are satellite dishes used to deliver signals to multiple dwelling units (*e.g.*, apartment buildings, trailer parks).

[32] The term "reach" refers to the availability of a service in the community, *i.e.*, the number of homes to which the service is available even if residents choose not to subscribe.

[33] In this regard, we would further note that in the Commission's common carrier regulatory scheme, cost-based pricing along with unbundling, are key elements. We therefore ask whether unbundled cable channels should be further subject to cost-based pricing and, if so, how such a regulatory program would be implemented.

[34] The Commission stated, in the Proposed Rule Making in MM Docket No. 84-1296, *supra*, that it would not require that franchising authorities use rate of return regulation for basic cable service. The Commission stated that rate of return regulation was inappropriate because of its inherent costliness and complexity. The Commission therefore proposed to adopt a comparable rate method that would set the regulated basic cable service rate equal to the level in comparable unregulated markets. To ensure greater flexibility and ease of implementation, the Commission also proposed a plus or minus ten percent "zone of reasonableness" of the average rate of the comparable cable systems. Parties commenting on the proposal argued that rates should be established through negotiation between the franchising authority and the cable operator. In the *Report and Order*, the Commission concurred that, consistent with the statute, the determination of the appropriate regulated rate is best left to the local franchising authority, and declined to require that franchising authorities adopt any particular rate regulation approach. *Report and Order*, *supra*, at para. 125.

The Commission originally adopted a cost pass-through standard which would have permitted cable systems subject to basic service rate regulation to automatically pass through any readily identifiable increase (or decrease) in cost which is entirely attributable to the provision of basic service, e.g., the price of programming appearing on the basic service tier. In ACLU, the court ruled that the Commission exceeded its authority by establishing this cost pass-through mechanism.

[35] On a related matter, we note that Section 621(d)(1) gives the Commission authority to "require the filing of informational tariffs for any intrastate communications service provided by a cable system, other than cable service, that would be subject to regulation by the Commission or any State if offered by a common carrier subject, in whole or in part, to Title II of this Act." Under this provision, the Commission could require the filing of informational tariffs to monitor such services. We determined in 1985 that it was then unnecessary to require the filing of such tariffs. We seek comment on whether we should now require such filings. Parties favoring such a filing requirement are asked to explain how the benefits outweigh the burden this requirement would impose on cable systems, as well as to explain what such services exist and how common they are.

[36] *See Notice of Proposed Rulemaking* in Docket No. 20681, 57 FCC 2d 368 (1975). *See also Report and Order* in Docket No. 20681, 60 FCC 2d 672 (1976).

[37] *Report and Order* in Docket 82-528, 43 FR 51791 (1978).

[38] *See Notice of Proposed Rule Making*, MM Docket No. 84-1296, *supra*, at para. 48.

[39] *Policy and Rules Concerning Rates for Dominant Carriers,* CC Docket No. 87-313, *Report and Order and Second Further Notice of Proposed Rulemaking,* 4 FCC Rcd 2873 (1989) ("Price Caps" docket).

[40] We note that the *House Report* directs the Commission to define effective competition in a manner that can be easily interpreted and readily applied by a franchising authority. It states:

> In establishing the necessary regulations, the FCC should establish objective nationwide criteria which are readily applicable for determining on a community-by-community basis whether a cable system is subject to effective competition. . . . Regulations should specify objective criteria to avoid the need for an independent examination of the status of competition on a community-by-community basis.

House Report, supra, at 66. Thus, we intend that any revised effective competition standard be readily applicable with a minimal burden on private parties and the Commission.

[41] We note that Section 76.33(a)(4) of the rules provides that a cable system, once determined to be subject to effective competition after the effective date of this section, shall not be subject to regulation for one year after any change in market conditions which would cause it to be determined not to be subject to effective competition. By way of clarification, this section of the rules does not apply when a cable system becomes subject to regulation because the Commission modified the effective competition standard.

[42] *See para.* 11, *supra.*

[43] We note that the GAO survey found that only about 3 percent of cable systems remained regulated as of October 31, 1988. *See* GAO Survey, *supra,* at 4.

[44] Section 625(d), 47 U.S.C. §545(d). "Under the Cable Act, cable operators generally have the freedom to structure their service tiers in whatever way they wish." ACLU v. FCC, 823 F.2d at 1570.

[45] A cable operator may obtain a modification of a franchise programming obligation only after demonstrating to the franchising authority that the proposed modification will maintain the mix, quality, and level of the programming services. *See* Section 625(a), 47 U.S.C. §545(a).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket 86-182

In the Matter of

Automated Reporting Requirements
for Certain Class A and Tier 1
Telephone Companies (Parts 31,
43, 67, and 69 of the FCC's Rules)

ORDER

Adopted: January 16, 1990; Released: January 16, 1990

By the Chief, Common Carrier Bureau:

1. In the *ARMIS Order*, the Commission established an automated system for collecting from certain local exchange carriers the financial and operating data that we need to administer various provisions of the Commission's rules.[1] On May 11, 1989, pursuant to authority delegated in the *ARMIS Order*,[2] we issued ARMIS Report 43-04, the Access Report[3] Subject carriers filed their Access Reports for 1988 on August 1, 1989.

2. In the process of preparing the 1988 Access Report, carriers noted various technical changes that would ease the filing burden on them as well as improve the quality of the data provided to the Commission. The United States Telephone Association (USTA) Data Reporting Task Group requested that Bureau staff meet with them to discuss possible revisions to the Access Report. Several meetings took place during which USTA and members of the staff discussed proposals for improving the quality of the Access Report requirements. The Bureau's independent review of the data contained in the 1988 Access Reports also discloses a need for various minor technical corrections to the the report, instructions and specifications. Also, on August 8, 1988, the Commission released an *Order on Reconsideration and Supplemental Notice of Proposed Rule Making*[4] in CC Docket 78-72 *et al.*, which revised Section 36.380, Other Billing and Collection Expense. It is necessary to revise section VI.C.2.c(2)(b) of the Access Report to accommodate the change in Section 36.380.

3. We have compiled corrections and revisions to the Access Report that reflect the suggestions of the USTA Task Group and the staff's review, and that conform the report to the revision of Section 36.380. These changes are described in the Appendix to this *Order*. These minor changes will improve the quality of the data filed on the Access Report for 1989. Copies of the Access Report containing the corrections made herein are available from the Common Carrier Bureau's Accounting and Audits Division.

4. The attached revisions to the Access Report are adopted pursuant to authority delegated to the Bureau in paragraph 58 of the *ARMIS Order* and Section 0.291(b)(4) of the Commission's Rules. Because these changes are minor in nature, in most cases correcting report format errors pursuant to the recommendations of the carriers filing the reports, compliance with the notice and comment procedure of the Administrative Procedure Act is unnecessary. *See* 5 U.S.C. Section 553(B).

5. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. Section 154(i), that the Access Report IS REVISED, as set forth in the Appendix hereto.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

APPENDIX

The specific changes to the Access Report are:

Row 10 - Provision is made for entry of Part 69 data. Columns (j), (k), (n) and (p) are opened.

Row 12 - Provision is made for entry of Part 69 data. Columns (j), (k), (n) and (p) are opened.

Row 14 - Provision is made for entry of Part 69 data. Columns (j), (k), (n) and (p) are opened.

Row 16 - Provision is made for entry of Part 69 data. Columns (j), (k), (n) and (p) are opened.

Row 18 - Provision is made for entry of Part 69 data. Columns (j), (k), (n) and (p) are opened.

Row 20 - Provision is made for entry of Part 69 data. Columns (j), (k), (n) and (p) are opened.

Row 22 - Provision is made for entry of Part 69 data. Columns (j), (k), (n) and (p) are opened.

Row 24 - Provision is made for entry of Part 69 data. Columns (j), (k), (n) and (p) are opened.

Row 26 - Provision is made for entry of Part 69 data. Columns (j), (k), (n) and (p) are opened.

Row 28 - Provision is made for entry of Part 69 data. Columns (j), (k), (n) and (p) are opened.

Row 30 - Provision is made for entry of Part 69 data. Columns (j), (k), (n) and (p) are opened.

Row 40 - Provision is made for entry of Part 69 data. Columns (j), (k), (n) and (p) are opened.

Row 42 - Provision is made for entry of Part 69 data. Columns (j), (k), (n) and (p) are opened.

Row 44 - Provision is made for entry of Part 69 data. Columns (j), (k), (n) and (p) are opened.

Row 46 - Provision is made for entry of Part 69 data. Columns (j), (k), (n) and (p) are opened.

Row 48 - Provision is made for entry of Part 69 data. Columns (j), (k), (n) and (p) are opened.

Row 50 - Provision is made for entry of Part 69 data. Columns (j), (k), (n) and (p) are opened.

Row 51 - The category title is revised to read, "Net EA Inv".

Row 60 - Provision is made for entry of Part 69 data. Columns (j), (k), (n) and (p) are opened.

Row 62 - Provision is made for entry of Part 69 data. Columns (j), (k), (n) and (p) are opened.

Row 64 - Provision is made for entry of Part 69 data. Columns (j), (k), (n) and (p) are opened.

Row 66 - Provision is made for entry of Part 69 data. Columns (j), (k), (n) and (p) are opened.

Row 68 - Provision is made for entry of Part 69 data. Columns (j), (k), (n) and (p) are opened.

Row 70 - Provision is made for entry of Part 69 data. Columns (j), (k), (n) and (p) are opened.

Row 72 - Provision is made for entry of Part 69 data. Columns (j), (k), (n) and (p) are opened.

Row 74 - Provision is made for entry of Part 69 data. Columns (j), (k), (n) and (p) are opened.

Row 76 - Provision is made for entry of Part 69 data. Columns (j), (k), (n) and (p) are opened.

Row 78 - Provision is made for entry of Part 69 data. Columns (j), (k), (n) and (p) are opened.

Row 80 - Provision is made for entry of Part 69 data. Columns (j), (k), (n) and (p) are opened.

Row 82 - Provision is made for entry of Part 69 data. Columns (j), (k), (n) and (p) are opened.

Row 90 - Provision is made for entry of Part 69 data. Columns (c), (d), (j), (k), (n) and (p) are opened.

Row 91 - Provision is made for entry of Part 69 data. Columns (c), (d), (j), (k), (n) and (p) are opened.

Row 92 - Provision is made for entry of Part 69 data. Columns (c), (d), (j), (k), (n) and (p) are opened.

Row 93 - Provision is made for entry of Part 69 data. Columns (c), (d), (j), (k), (n) and (p) are opened.

Section II. is revised to read, "*Telecommunications Plant*".

Row 1120 - N/As are inserted in columns (c) and (d).

Row 1136 - The category title is revised to read, "#Oth WSWS".

Row 1160 - Provision is made for entry of Part 69 data.

Row 1162 - Provision is made for entry of Part 69 data.

Row 1164 - Provision is made for entry of Part 69 data.

Row 1166 - Provision is made for entry of Part 69 data.

Row 1219 - Column (o) is opened.

Row 1270 - Provision for entry of Part 69 data is deleted. N/As are inserted in columns (e), (g), (i), (o) and (p).

Row 1450 - Provision for entry of Part 69 data is deleted. N/As are inserted in columns (e), (g), (i), (o) and (p).

Row 1523 - The category title is revised to read, "#MOU Miles".

Row 1540 - The category title is revised to read, "Tot Telpt - AA".

Row 2001 - Provision is made for entry of Part 69 data. Columns (e), (f), (g), (i), (j), (l), (m), (n), (o), (p), (q) and (r) are opened.

Row 2003 - Columns (e), (g), (i), (m), and (o) are opened.

Row 2005 - Columns (e), (g), (i) and (o) are opened.

Row 2007 - Columns (j) and (m) are opened.

Row 2013 - N/A is inserted in column (k).

Row 2014 - N/A is inserted in column (k).

Row 2020 - N/A is inserted in column (k).

Row 2130 - N/A is inserted in column (k).

Row 2131 - N/A is inserted in column (k).

Row 2140 - N/A is inserted in column (k).

Row 2150 - N/A is inserted in column (k).

Row 2160 - N/A is inserted in column (k).

Row 2162 - N/A is inserted in column (k).

Row 2190 - Provision is made for entry of Part 69 data. Columns (e), (f), (g), (i), (j), (l), (m), (n), (o), (p) and (r) are opened.

Row 2191 - Provision is made for entry of Part 69 data. Columns (e), (f), (g), (i), (j), (l), (m), (n), (o), (p) and (r) are opened.

Row 2192 - Provision is made for entry of Part 69 data. Columns (e), (f), (g), (i), (j), (l), (m), (n), (o), (p) and (r) are opened.

Row 2193 - Provision is made for entry of Part 69 data. Columns (e), (f), (g), (i), (j), (l), (m), (n), (o), (p) and (r) are opened.

Row 2194 - Provision is made for entry of Part 69 data. Columns (e), (f), (g), (i), (j), (l), (m), (n), (o), (p) and (r) are opened.

Row 2201 - N/A is inserted in column (k).

Row 2202 - N/A is inserted in column (k).

Row 2203 - N/A is inserted in column (k).

Row 2210 - N/A is inserted in column (k).

Row 2212 - N/A is inserted in column (k).

Section III.A.2.E. is revised to read, "*Inventories and Cash Working Capital* ".

Section III.A.2.E.1. is revised to read, "*Inventories* ".

Row 2220 - The category is revised to read, "CPE Inventories".

Row 2221 - The category is revised to read, "All Oth Invtr" and N/A is inserted in column (k).

Row 2223 - N/A is inserted in column (k).

Row 2224 - The category is revised to read, "Tot Invtr" and N/A is inserted in column (k).

Row 2230 - N/A is inserted in column (k).

Row 2231 - N/A is inserted in column (k).

Row 2250 - N/A is inserted in column (k).

Row 2260 - Provision is made for entry of Part 69 data.

Row 3020 - Columns (e), (g), (i), (m) and (o) are opened.

Row 3021 - Columns (e), (g), (i), (m) and (o) are opened.

Row 3030 - Columns (e), (g), (i) and (o) are opened.

Row 3031 - Columns (e), (g), (i) and (o) are opened.

Row 3040 - Columns (j) and (m) are opened.

Row 3041 - Columns (j) and (m) are opened.

Row 3070 - N/A is inserted in column (k).

Row 3071 - N/A is inserted in column (k).

Row 3100 - Columns (e), (g), (i), (m) and (o) are opened.

Row 3101 - Columns (e), (g), (i), (m) and (o) are opened.

Row 3110 - Columns (e), (g) and (i) are opened.

Row 3111 - Columns (e), (g) and (i) are opened.

Row 3120 - Columns (j) and (m) are opened.

Row 3121 - Columns (j) and (m) are opened.

Row 3150 - N/A is inserted in column (k).

Row 3240 - N/A is inserted in column (k).

Row 3241 - N/A is inserted in column (k).

Row 3250 - N/A is inserted in column (k).

Row 3251 - N/A is inserted in column (k)

Row 3260 - N/A is inserted in column (k).

Row 3290 - Columns (e), (g), (i), (m) and (o) are opened.

Row 3291 - Columns (e), (g), (i), (m) and (o) are opened.

Row 3300 - Columns (e), (g), (i) and (o) are opened.

Row 3301 - Columns (e), (g), (i) and (o) are opened.

Row 3310 - Columns (j) and (m) are opened.

Row 3311 - Columns (j) and (m) are opened.

Row 3340 - Column (k) is opened.

Row 3360 - Columns (e), (g), (i), (m) and (o) are opened.

Row 3361 - Columns (e), (g), (i), (m) and (o) are opened.

Row 3370 - Columns (e), (g), (i) and (o) are opened.

Row 3371 - Columns (e), (g), (i) and (o) are opened.

Row 3380 - Columns (j) and (m) are opened.

Row 3381 - Columns (j) and (m) are opened.

Row 3410 - Column (k) is opened.

Row 3421 - N/A is inserted in column (k).

Row 4005 - Columns (o) and (p) are opened.

Row 4013 - N/A is inserted in column (j).

Row 4014 - N/As are inserted in columns (e), (f), and (g). Column (r) is opened.

Row 4024 - Columns (i), (j), (k), (l), (m), (n), (o) and (p) are opened.

Row 4033 - N/As are inserted in columns (e), (f) and (g).

Row 4040 - N/As are inserted in columns (e), (f) and (g).

Row 4050 - N/As are inserted in columns (e), (f) and (g).

Row 4064 - N/A is inserted in column (k).

Row 4065 - N/A is inserted in column (k).

Row 4066 - N/A is inserted in column (k).

Row 4074 - N/A is inserted in column (k).

Row 4075 - N/A is inserted in column (k).

Row 4076 - N/A is inserted in column (k).

Row 4080 - N/A is inserted in column (k).

Row 4082 - N/A is inserted in column (k).

Row 4090 - N/A is inserted in column (k).

Row 4110 - N/A is inserted in column (k).

Row 4120 - N/As are inserted in columns (e), (f), (g) and (k).

Row 5000 - N/A is inserted in column (k).

Row 5002 - N/A is inserted in column (k).

Row 5013 - N/A is inserted in column (k).

Row 6030 - Columns (e), (g), (i), (m) and (o) are opened.

Row 6031 - Columns (e), (g), (i), (m) and (o) are opened.

Row 6040 - Columns (e), (g), (i) and (o) are opened.

Row 6041 - Columns (e), (g), (i) and (o) are opened.

Row 6050 - Columns (j) and (m) are opened.

Row 6051 - Columns (j) and (m) are opened.

Row 6080 - N/A is inserted in column (k).

Row 6081 - N/A is inserted in column (k).

Row 6090 - N/A is inserted in column (k).

Row 6110 - Columns (e), (g), (i), (m) and (o) are opened.

Row 6111 - Columns (e), (g), (i), (m) and (o) are opened.

Row 6120 - Columns (e), (g), (i) and (o) are opened.

Row 6121 - Columns (e), (g), (i) and (o) are opened.

Row 6130 - Columns (j) and (m) are opened.

Row 6131 - Columns (j) and (m) are opened.

Row 6250 - N/A is inserted in column (k).

Row 6251 - N/A is inserted in column (k).

Row 6252 - N/A is inserted in column (k).

Row 6253 - N/A is inserted in column (k).

Row 6254 - N/A is inserted in column (k).

Row 6260 - N/A is inserted in column (k).

Row 6270 - N/A is inserted in column (k).

Row 7000 - N/As are inserted in columns (k) and (q).

Row 7002 - N/As are inserted in columns (k) and (q).

The row between 7083 and 7085 is renumbered 7084.

The row between 7183 and 7185 is renumbered 7184.

Row 7207 - Column (f) is opened.

Row 7211 - Column (n) is opened.

Row 7212 - Column (n) is opened.

Row 7240 - The category is retitled, "#Tot Curr Users".

Row 7241 - The category is retitled,"#Msg Toll Users".

Row 7242 - The category is retitled, "#PL Users".

Row 7243 - The category is retitled, "#TWX Users".

Row 7244 - The category is retitled, "#Ex & Semi Users".

Row 7245 - The category is blank and N/A is inserted in column (b).

Row 7246 - The category is blank and N/A is inserted in column (b).

Row 7247 - The category is retitled, "#Dir Ad Users".

Row 7248 - The category is blank and N/A is inserted in column (b).

Row 7250 - The category is blank and N/A is inserted in column (b).

Row 7251 - The category is retitled, "MTS Exp" and columns (c) and (d) are opened.

Row 7252 - The category is retitled, "#MTS Msg" and columns (c) and (d) are opened.

Row 7253 - The category is retitled, "TWX Exp" and columns (c) and (d) are opened.

Row 7254 - The category is retitled, "#TWX Con" and columns (c) and (d) are opened.

Row 7255 - The category is retitled, "Ex Semi & DA Exp" and column (c) is opened.

Row 7256 - The category is retitled, "PL Exp" and columns (c) and (d) are opened.

Row 7257 - The category is retitled, "#PL Accounts" and columns (c) and (d) are opened.

Row 7258 - The category is retitled, "EU CL A&Bill Exp" and columns (c) and (d) are opened.

Row 7260 - The category is blank and N/As are inserted in columns (b), (c) and (d).

Row 7281 - N/A is inserted in column (k).

Row 7282 - N/A is inserted in column (k).

Row 7290 - Columns (b) and (c) are opened.

Row 7300 - N/A is inserted in column (k).

Row 7302 - N/A is inserted in column (k).

Row 7310 - N/A is inserted in column (k).

Row 7320 - N/A is inserted in column (k).

Row 7330 - N/A is inserted in column (k).

Row 7331 - N/A is inserted in column (k).

Row 7333 - N/A is inserted in column (k).

Row 7334 - N/A is inserted in column (k).

Row 7350 - N/A is inserted in column (k).

Row 8000 - N/As are inserted in columns (e), (f) and (g).

Row 8001 - N/As are inserted in columns (e), (f) and (g).

Row 8005 - N/As are inserted in columns (e), (f) and (g).

Row 8006 - N/As are inserted in columns (e), (f) and (g).

Row 8007 - N/As are inserted in columns (e), (f) and (g).

Row 8020 - N/As are inserted in columns (e), (f) and (g).

Row 8021 - N/As are inserted in columns (e), (f) and (g).

Row 8030 - N/As are inserted in columns (e), (f) and (g).

Row 8040 - Rows (b) and (c) are opened. N/As are inserted in columns (e), (f) and (g).

Row 8041 - N/As are inserted in columns (e), (f), (g), (q) and (r).

Row 8042 - N/As are inserted in columns (e), (f), (g), (q) and (r).

Row 8043 - N/As are inserted in columns (e), (f), (g), (q) and (r).

Row 8044 - N/As are inserted in columns (e), (f), (g), (q) and (r).

Row 8045 - N/As are inserted in columns (e), (f), (g), (q) and (r).

Row 9000 - N/A is inserted in column (q).

Row 9001 - N/A is inserted in column (q).

Row 9006 - Columns (c) and (d) are opened.

The specific change to the general instructions is:

No. 7 is revised to read, "All dollar amounts must be rounded to the nearest thousand, with the exception of rows 1273, 1335, 1453, 1495, 9005, 9007, 9008 and 9009. The dollar amounts in these rows must be rounded to the nearest penny and such amounts must be entered in dollars and cents (*e.g.*, if cost per loop is $6.445 it must be entered as $6.45. Do not round row 9007. Amounts of minutes or seconds must be rounded to the nearest million. All conversation-minute-miles and circuit miles must be rounded to the nearest million. All rate of return and other percentage amounts (*e.g.*, Rate of Return Including Refund and Loop Allocation Factor amounts) must be entered in percent and must

be rounded to 2 decimal places (*e.g.*, 12 2/3 percent should be entered as 12.67). All other amounts must be rounded to the nearest thousand".

The specific changes to the row instructions are:

Section I.*Note* : is revised with the addition of two sentences which read, "Carriers having an equal access element must enter these costs in the equal access column (column (k)). Carriers not having an equal access element must enter these costs in the appropriate column."

Row 10 - The instruction is revised to read, "Equal Access investment in General Support Facilities that is allocated pursuant to Sections 36.191(c) and 69.308(a). *See also* Section 36.111."

Row 12 - The instruction is revised to read, "Equal Access investment in Category 2 Central Office Equipment (COE) that is allocated pursuant to Sections 36.191(c) and 69.308(a). *See also* Section 36.124."

Row 14 - The instruction is revised to read, "Equal Access investment in Category 3 COE that is allocated pursuant to Sections 36.191(c) and 69.308(a)".

Row 16 - The instruction is revised to read, "Equal Access investment in other COE that is allocated pursuant to Sections 36.191(c) and 69.308(a). *See also*, Sections 36.123 and 36.126."

Row 18 - The instruction is revised to read, "Equal Access investment in Information Origination/Termination equipment that is allocated pursuant to Sections 36.191(c) and 69.308(a). *See also*, Section 36.141."

Row 20 - The instruction is revised to read, "Equal Access investment in Cable and Wire Facilities (C&WF) that is allocated pursuant to Sections 36.191(c) and 69.308(a). *See also*, Section 36.151(a)."

Row 22 - The instruction is revised to read, "Equal Access investment in Amortizable Assets that is allocated pursuant to Sections 36.191(c) and 69.308(a). *See also*, Section 36.161."

Row 24 - The instruction is revised to read, "Equal Access investment in other plant that is allocated pursuant to Sections 36.191(c) and 69.308(a). *See also*, Sections 36.171 and 36.172."

Row 26 - The instruction is revised to read, "Inventories that are associated with Equal Access and are allocated pursuant to Sections 36.191(c) and 69.308(a). *See also*, Section 36.181."

Row 28 - The instruction is revised to read, "Cash Working Capital that is associated with Equal Access and is allocated pursuant to Sections 36.191(c) and 69.308(a). *See also*, Section 36.182."

Row 30 - The instruction is revised to read, "Total Equal Access Telecommunications Property, total of rows 10, 12, 14, 16, 18, 20, 22, 24, 26, and 28".

Row 40 - The instruction is revised to read, "Accumulated Depreciation that is related to Equal Access investment and is allocated pursuant to Sections 36.191(c) and 69.308(a). *See also*, Section 36.503(a)."

Row 42 - The instruction is revised to read, "Accumulated amortization of Tangible and Intangible Assets and other accumulated amortization that is associated with Equal Access and is allocated pursuant to Sections 36.191(c) and 69.308(a). *See also*, Section 36.505(a)."

Row 44 - The instruction is revised to read, "Net Current Deferred Operating Income Taxes that are associated with Equal Access and are allocated pursuant to Sections 36.191(c) and 69.308(a). *See also*, Section 36.506(a)."

Row 46 - The instruction is revised to read, "Net Noncurrent Deferred Operating Income Taxes that are associated with Equal Access and are allocated pursuant to Sections 36.191(c) and 69.308(a). *See also*, Section 36.506(a)."

Row 48 - The instruction is revised to read, "All other reserves and deferrals that are associated with Equal Access and are allocated pursuant to Sections 36.191(c) and 69.308(a). *See also*, Section 36.507(a)."

Row 50 - The instruction is revised to read, "Total reserves and deferrals that are related to Equal Access, total of rows 40, 42, 44, 46, and 48".

Row 51 - The instruction is revised to read, "Net Equal Access investment, row 30 less row 50, including amounts that are directly assigned pursuant to Section 69.308(a)".

Row 60 - The instruction is revised to read, "General Support Expenses that are associated with Equal Access and are allocated pursuant to Sections 36.421(b) and 69.410(a). *See also*, Section 36.111."

Row 62 - The instruction is revised to read, "Network Support Expenses that are associated with Equal Access and are allocated pursuant to Sections 36.421(b) and 69.410(a). *See also*, Section 36.111."

Row 64 - The instruction is revised to read, "Central Office Expenses that are associated with Equal Access and are allocated pursuant to Sections 36.421(b) and 69.410(a). *See also*, Section 36.321(a)."

Row 66 - The instruction is revised to read, "Information Origination/Termination Expenses that are associated with Equal Access and are allocated pursuant to Sections 36.421(b) and 69.410(a). *See also*, Section 36.331."

Row 68 - The instruction is revised to read, "C&WF Expenses that are associated with Equal Access and are allocated pursuant to Sections 36.421(b) and 69.410(a). *See also*, Section 36.341(a)."

Row 70 - The instruction is revised to read, "Other Property Plant and Equipment Expenses that are associated with Equal Access and are allocated pursuant to Sections 36.421(b) and 69.410(a). *See also*, Section 36.352(a)."

Row 72 - The instruction is revised to read, "Network Operations Expenses that are associated with Equal Access and are allocated pursuant to Sections 36.421(b) and 69.410(a). *See also*, Section 36.353."

Row 74 - The instruction is revised to read, "Access Expenses that are associated with Equal Access and are allocated pursuant to Sections 36.421(b) and 69.410(a). *See also*, Section 36.354(a)."

Row 76 - The instruction is revised to read, "Depreciation and amortization expenses that are associated with Equal Access and are allocated pursuant to Sections 36.421(b) and 69.410(a). *See also*, Section 36.361(a)."

Row 78 - The instruction is revised to read, "Marketing Expenses that are associated with Equal Access and are allocated pursuant to Sections 36.421(b) and 69.410(a). *See also*, Section 36.372(a)."

Row 80 - The instruction is revised to read, "Services Expenses that are associated with Equal Access and are allocated pursuant to Sections 36.421(b) and 69.410(a). *See also*, Section 36.373(a)."

Row 82 - The instruction is revised to read, "Corporate Operations Expenses that are associated with Equal Access and are allocated pursuant to Sections 36.421(b) and 69.410(a)".

Section II. is revised to read, "*Telecommunications Plant* ".

Row 1120 - The instruction is revised to read, "Joint service observing boards that are apportioned between exchange and toll pursuant to Section 36.123(d). This amount is disaggregated between the exchange and toll portions of joint service observing boards on rows 1123 and 1124".

Row 1123 - The instruction is revised to read, "Exchange portion of joint service observing boards that are directly assigned pursuant to Section 36.123(d). *See* instructions for row 1120".

Row 1124 - The instruction is revised to read, "Toll portion of joint service observing boards that are allocated pursuant to Section 36.123(d). *See* instructions for row 1120".

Row 1126 - The instruction is revised to read, "Total separate toll service observing boards and the toll portion of joint service observing boards that are allocated pursuant to Sections 36.123(d) and 69.306(b). This amount is the total of rows 1124 and 1125."

Row 1133 - The instruction is revised to read, "The portion of auxiliary service boards associated with toll directory assistance service that is allocated pursuant to Sections 36.123(c)(1)(i) and 69.306(b)".

Row 1135 - The instruction is revised to read, "The portion of auxiliary service boards associated with other directory assistance that is allocated pursuant to Sections 36.123(c)(1)(i) and 69.306(b)".

Row 1153 - The instruction is revised to read, "Total joint auxiliary service boards, total of rows 1144, 1149, and 1151".

Row 1160 - The instruction is revised to read, "Operator Traffic Service Position Systems that are allocated pursuant to Section 36.123(e)(1) and directly assigned pursuant to Section 69.306(b)".

Row 1162 - The instruction is revised to read, "Remote trunking arrangements that are allocated pursuant to Section 36.123(e)(2) and directly assigned pursuant to Section 69.306(b)".

Row 1164 - The instruction is revised to read, "Remaining investment at the central control location that is allocated pursuant to Section 36.123(e)(3) and directly assigned pursuant to Section 69.306(b)".

Row 1166 - The instruction is revised to read, "Other Traffic Service Positions associated with common basic control units that are allocated pursuant to Section 36.123(b)(1)(iv) and directly assigned pursuant to Section 69.306(b)".

Row 1168 - The instruction is revised to read, "Total Traffic Service Positions, total of rows 1160, 1162, 1164, and 1166, including amounts that are directly assigned pursuant to Section 69.306(b)".

Row 1270 - The instruction is revised to read, "Total number of working loops used to allocate basic Category 4.13 COE pursuant to Sections 36.126(c)(3) and 36.154(a)".

Row 1450 - The instruction is revised to read, "Total number of working loops used to determine the amount of Category 1 C&WF pursuant to Section 36.154(a)".

Row 1473 - The instruction is revised to read, "Minutes-of-use that are used to allocate non-wideband exchange trunk Category 2 C&WF pursuant to Section 36.155".

Row 1485 - The instruction is revised to read, "Total Category 2 C&WF, total of rows 1474 and 1484 including Category 2 C&WF that is directly assigned pursuant to Section 69.305".

Row 1523 - The instruction is revised to read, "Minutes-of-use miles used to allocate message Category 4 C&WF pursuant to Section 36.157(a)(1)".

Row 1540 - The instruction is revised to read, "Total Telecommunications Plant, excluding amortizable assets, the total of rows 10, 12, 14, 16, 18, 20, 1000, 1410, 1440, and 1530".

Row 2001 - The instruction is revised to read, "Capital leases that are associated with General Support Facilities and are allocated pursuant to Section 36.161(b) and are directly assigned pursuant to Section 69.310(a)".

Section III.A.2.E. is revised to read, "*Inventories and Cash Working Capital* ".

Section III.A.2.E.1. is revised to read, "*Inventories* ".

Row 2220 - The instruction is revised to read, "Inventories that are associated with customer premises equipment and are directly assigned pursuant to Section 36.181(a)".

Row 2221 - The instruction is revised to read, "Other Inventories that are allocated pursuant to Sections 36.181(a) and 69.309".

Row 2222 - The instruction is revised to read, "C&WF investment used to allocate other Inventories pursuant to Section 36.181(a)".

Row 2223 - The instruction is revised to read, "Combined investment used to allocate Inventories pursuant to Section 69.309".

Row 2224 - The instruction is revised to read, "Total Inventories, total of rows 2220 and 2221".

Row 2230 - The instruction is revised to read, "Cash Working Capital that is directly assigned or allocated pursuant to Section 36.182(a) and is allocated pursuant to Section 69.309. *See also*, Section 65.820(d)."

Row 2240 - The instruction is revised to read, "Total Other Telecommunications Property, total of rows 22, 24, 26, 28, 93, 2150, 2160, 2203, 2210, 2224, and 2230".

Row 2260 - The instruction is revised to read, "Total Telecommunications Property, the total of rows 1540, 2240, and row 2250".

Row 3080 - The instruction is revised to read, "Total accumulated depreciation, total of rows 40, 3010, 3020, 3030, 3040, 3050, 3060, and 3070".

Row 3090 - The instruction is revised to read, "Accumulated amortization of capital leases associated with General Support Facilities and which accumulated amortization is allocated pursuant to Sections 36.505(a), 69.2(z), and 69.301(a)".

Row 3091 - The instruction is revised to read, "General Support Facilities investment used to allocate accumulated amortization of associated capital leases pursuant to Sections 36.505(a), 69.2(z), and 69.301(a)".

Row 3100 - The instruction is revised to read, "Accumulated amortization of capital leases associated with Switching Equipment and which accumulated amortization is allocated pursuant to Sections 36.505(a), 69.2(z), and 69.301(a)".

Row 3101 - The instruction is revised to read, "Switching Equipment investment used to allocate accumulated amortization of associated capital leases pursuant to Sections 36.505(a), 69.2(z), and 69.301(a)".

Row 3110 - The instruction is revised to read, "Accumulated amortization of capital leases associated with Operator Systems Equipment and which accumulated amortization is allocated pursuant to Sections 36.505(a), 69.2(z), and 69.301(a)".

Row 3111 - The instruction is revised to read, "Operator Systems investment used to allocate accumulated amortization of associated capital leases pursuant to Sections 36.505(a), 69.2(z), and 69.301(a)".

Row 3120 - The instruction is revised to read, "Accumulated amortization of capital leases associated with Transmission Equipment and which accumulated amortization is allocated pursuant to Sections 36.505(a), 69.2(z), and 69.301(a)".

Row 3121 - The instruction is revised to read, "Transmission Equipment investment used to allocate accumulated amortization of associated capital leases pursuant to Sections 36.505(a), 69.2(z), and 69.301(a)".

Row 3130 - The instruction is revised to read, "Accumulated amortization of capital leases associated with Information Origination/Termination equipment and which accumulated amortization is allocated pursuant to Sections 36.505(a), 69.2(z), and 69.301(a)".

Row 3131 - The instruction is revised to read, "Information Origination/Termination equipment investment used to allocate accumulated amortization of associated capital leases pursuant to Sections 36.505(a), 69.401(f), 69.2(z), and 69.301(a)".

Row 3140 - The instruction is revised to read, "Accumulated amortization of capital leases associated with Cable and Wire Facilities and which accumulated amortization is allocated pursuant to Sections 36.505(a), 69.2(z), and 69.301(a)".

Row 3141 - The instruction is revised to read, "Cable and Wire Facilities investment used to allocate accumulated amortization of associated capital leases pursuant to Sections 36.505(a), 69.2(z), and 69.401(f)".

Row 3150 - The instruction is revised to read, "Total accumulated amortization of capital leases, total of rows 3090, 3100, 3110, 3120, 3130, and 3140. If amortization of capital leases is apportioned among the access elements based on Telecommunications Plant In Service, enter the amounts of accumulated amortization of capital leases, pursuant to Section 69.310(a), in this row."

Row 3160 - The instruction is revised to read, "Accumulated amortization of leasehold improvements associated with General Support Facilities and which accumulated amortization is allocated pursuant to Sections 36.505(a), 69.2(z), and 69.301(a)".

Row 3161 - The instruction is revised to read, "General Support Facilities investment used to allocate accumulated amortization of associated leasehold improvements pursuant to Sections 36.505(a), 69.2(z), and 69.301(a)".

Row 3170 - The instruction is revised to read, "Accumulated amortization of leasehold improvements associated with Switching Equipment and which accumulated amortization is allocated pursuant to Sections 36.505(a), 69.2(z), and 69.301(a)".

Row 3171 - The instruction is revised to read, "Switching Equipment investment used to allocate accumulated amortization of associated leasehold improvements pursuant to Sections 36.505(a), 69.2(z), and 69.301(a)".

Row 3180 - The instruction is revised to read, "Accumulated amortization of leasehold improvements associated with Operator Systems Equipment and which accumulated amortization is allocated pursuant to Sections 36.505(a), 69.2(z), and 69.301(a)".

Row 3181 - The instruction is revised to read, "Operator Systems investment used to allocate accumulated amortization of associated leasehold improvements pursuant to Sections 36.505(a), 69.2(z), and 69.301(a)".

Row 3190 - The instruction is revised to read, "Accumulated amortization of leasehold improvements associated with Transmission Equipment and which accumulated amortization is allocated pursuant to Sections 36.505(a), 69.2(z), and 69.301(a)".

Row 3191 - The instruction is revised to read, "Transmission Equipment investment used to allocate accumulated amortization of associated leasehold improvements pursuant to Sections 36.505(a), 69.2(z), and 69.301(a)".

Row 3200 - The instruction is revised to read, "Accumulated amortization of leasehold improvements associated with Information Origination/Termination Equipment and which accumulated amortization is allocated pursuant to Sections 36.505(a), 69.2(z), and 69.301(a)".

Row 3201 - The instruction is revised to read, "Information Origination/Termination investment used to allocate accumulated amortization of associated leasehold improvements pursuant to Sections 36.505(a), 69.2(z), and 69.301(a)".

Row 3210 - The instruction is revised to read, "Accumulated amortization of leasehold improvements associated with Cable and Wire Facilities and which accumulated amortization is allocated pursuant to Sections 36.505(a), 69.2(z), and 69.301(a)".

Row 3211 - The instruction is revised to read, "Cable and Wire Facilities investment used to allocate accumulated amortization of associated leasehold improvements pursuant to Sections 36.505(a), 69.2(z), and 69.301(a)".

Row 3220 - The instruction is revised to read, "Total accumulated amortization of leasehold improvements, total of rows 3160, 3170, 3180, 3190, 3200, and 3210. If amortization of leasehold improvements is apportioned among the access elements based on Telecommunications Plant In Service, enter the amounts of accumulated amortization of leasehold improvements, pursuant to Section 69.310(a), in this row."

Row 3240 - The instruction is revised to read, "Accumulated amortization of Intangible Assests that is allocated pursuant to Sections 36.505(a), 69.2(z), and 69.301(a)".

Row 3241 - The instruction is revised to read, "Intangible Assets used to allocate associated accumulated amortization pursuant to Sections 36.505(a), 69.2(z), and 69.301(a)".

Row 3250 - The instruction is revised to read, "Other accumulated amortization that is allocated pursuant to Sections 36.505(a), 69.2(z), and 69.301(a)".

Row 3251 - The instruction is revised to read, "Associated investment used to allocate other accumulated amortization pursuant to Sections 36.505(a), 69.2(z), and 69.301(a)".

Row 3270 - The instruction is revised to read, "Total accumulated amortization, total of rows 42, 3230 and 3260".

Row 3340 - The instruction is revised to read, "Total Net Current Deferred Operating Income Taxes, total of rows 44, 3280, 3290, 3300, 3310, 3320, and 3330".

Row 3410 - The instruction is revised to read, "Total Net Noncurrent Deferred Operating Income Taxes, total of rows 46, 3350, 3360, 3370, 3380, 3390, and 3400".

Row 4000 - The instruction is revised to read, "Local private line revenues from broadcast program transmission audio and video services that are directly assigned pursuant to Section 36.212(a)".

Row 4032 - The instruction is revised to read, "All Other Miscellaneous Revenues that are apportioned pursuant to Section 36.215(c)".

Row 4040 - The instruction is revised to read, "Uncollectible Revenues that are apportioned pursuant to Section 36.216(a), including amounts that are allocated pursuant to Part 69".

Row 4050 - The instruction is revised to read, "Total Revenues, the total of rows 4005, 4014, 4024, and 4033, including amounts that are allocated pursuant to Part 69, less row 4040".

Row 4090 - The instruction is revised to read, "Extraordinary items that are apportioned pursuant to Section 36.224(a)".

Row 4120 - The instruction is revised to read, "Total Operating Revenues less income effects of jurisdictional ratemaking differences, the net of rows 4050 and 4100".

Row 5074 - The instruction is revised to read, "Cable and Wire Facilities Expenses that are allocated pursuant to Sections 69.304, 69.305, and 69.401(c)".

Row 6160 - The instruction is revised to read, "Total amortization expenses of capital leases, total of rows 6100, 6110, 6120, 6130, 6140, and 6150. If amortization expenses of capital leases are apportioned among the access elements based on Telecommunications Plant In Service, enter the amounts of amortization expenses of capital leases, pursuant to Section 69.310(a), in this row."

Row 6230 - The instruction is revised to read, "Total amortization expenses of leasehold improvements, total of rows 6170, 6180, 6190, 6200, 6210, and 6220. If amortization expenses of leasehold improvements are apportioned among the access elements based on Telecommunications Plant in Service, enter the amounts of amortization expenses of leasehold improvements, pursuant to Section 69.310(a), on this row."

Row 7070 - The instruction is revised to read, "Classified directory expenses that are directly assigned pursuant to Sections 36.375(b)(1) and 69.405(a)".

Row 7074 - The instruction is revised to read, "Subscriber line minutes-of-use used to allocate the expense of alphabetical and street address directories and traffic information records pursuant to Section 36.375(b)(3)".

Row 7240 - The instruction is revised to read, "Total current users used to determine the allocation factor of Other Billing and Collecting Expenses pursuant to Section 36.380(b).[1] This amount is equal to the total of rows 7241, 7242, 7243, 7244, and 7247."

Row 7241 - The instruction is revised to read, "Message toll users equal the number of current message toll telephone and telegram users (excluding semi-

public when tolls are not amortized on the bill) used to determine the allocation of Other Billing and Collecting Expenses pursuant to Section 36.380(b)".

Row 7242 - The instruction is revised to read, "Number of current private line service users used to determine the allocation of Other Billing and Collecting Expenses pursuant to Section 36.380(b)".

Row 7243 - The instruction is revised to read, "Number of current TWX users used to determine the allocation of Other Billing and Collecting Expenses pursuant to Section 36.380(b)".

Row 7244 - The instruction is revised to read, "Number of current exchange and semi-public telephone users used to determine the allocation of Other Billing and Collecting Expenses pursuant to Section 36.380(b)".

Row 7245 is reserved.

Row 7246 is reserved.

Row 7247 - The instruction is revised to read, "Number of current directory advertising users used to determine the allocation of Other Billing and Collecting Expenses pursuant to Section 36.380(b)".

Row 7248 is reserved.

Row 7250 is reserved.

Row 7251 - The instruction is revised to read, "MTS expenses are Other Billing and Collecting Expenses allocated to message toll telephone and telegram use pursuant to Section 36.380(b)(1)".

Row 7252 - The instruction is revised to read, "MTS messages equal the number of non-affiliated company telegram message, state message toll telephone messages and interstate message toll messages used to apportion message toll telephone and telegram expenses between the operations pursuant to Section 36.380(b)(1)".

Row 7253 - The instruction is revised to read, "TWX expenses are Other Billing and Collecting Expenses allocated to TWX use pursuant to Section 36.380(b)(2)".

Row 7254 - The instruction is revised to read, "Number of TWX connections used to apportion TWX expenses between the operations pursuant to Section 36.380(b)(2)".

Row 7255 - The instruction is revised to read, "Exchange, semi-public telephone and directory advertising expenses are Other Billing and Collecting Expenses allocated to exchange, including semi-public, use and directory advertising use pursuant to Section 36.380(b)(3)".

Row 7256 - The instruction is revised to read, "Private line expenses are Other Billing and Collecting Expenses allocated to private line services use pursuant to Section 36.380(b)(4)".

Row 7257 - The instruction is revised to read, "Private line accounts equal the number of intrastate and interstate private line service accounts used to apportion private line services expenses pursuant to Section 36.380(b)(4)".

Row 7258 - The instruction is revised to read, "End user common line access billing expenses are Other Billing and Collecting Expenses assigned or apportioned to end user activity pursuant to Section 36.380(c)".

Row 7259 - The instruction is revised to read, "Total Other Billing and Collecting Expenses, the total of rows 7251, 7253, 7255, 7256 and 7258".

Row 7260 is reserved.

Row 7351 - The instruction is revised to read, "Total Operating Expenses, the total of rows 84, 92, 5080, 6270, 7320, 7334, and row 7350. NOTE: Carriers must include amounts on rows 84 and 92".

Row 8000 - The instruction is revised to read, "State and local income taxes and local gross receipts taxes that are allocated pursuant to Sections 36.412(b) and 69.402(a)".

Row 8005 - The instruction is revised to read, "Total other state and local taxes that are allocated pursuant to Section 69.402(b). NOTE: Column (d) is the total of rows 8002 and 8003".

Row 8013 - The instruction is revised to read, "Internal Revenue Service income adjustment that is the difference between taxable income reported for Internal Revenue Service purposes and taxable income reported in accordance with Part 32."

Row 8020 - The instruction is revised to read, "Federal income tax that is allocated pursuant to Section 36.412(b). This amount is calculated by applying the applicable statutory federal income tax rate to the adjusted taxable income (basic local service revenue, plus network access revenue, long distance message revenue and miscellaneous revenues, less uncollectible revenue plus IRS income adjustment and FCC income adjustment less total operating expenses, total non-operating items excluding allowance for funds used during construction, total other taxes, and fixed charges) less investment tax credit amortization and FCC investment tax credit adjustment."

Row 8021 - The instruction is revised to read, "Approximate net taxable income used to allocate Federal Income Tax pursuant to Sections 36.412(b) and 69.402(a). This amount equals row 4120 plus rows 8013 and 8014 less rows 7351, 8007 and 8010."

Row 8040 - The instruction is revised to read, "Average net investment is calculated by dividing the sum of the average net investment for each month in the reporting period by the number of months in the reporting period".

Row 8041 - The instruction is revised to read, "Net Return, the net of rows 4120, 7351 and 8030".

Row 8042 - The instruction is revised to read, "Rate of Return (in percent) is calculated by dividing Net Return by Average Net Investment (row 8041 divided by row 8040)".

Row 8044 - The instruction is revised to read, "Net Return including FCC Refund, the total of rows 8041 and 8043".

Row 8045 - The instruction is revised to read, "Rate of Return including FCC Refund (in percent) is calculated by dividing Net Return including FCC Refund by Average Net Investment (row 8044 divided by row 8040)".

Row 9000 - The instruction is revised to read, "Carrier Common Line transitional support which is the amount received (positive amount) or disbursed (negative amount) pursuant to Section 69.612(b)".

Row 9001 - The instruction is revised to read, "Carrier Common Line long term support submitted to NECA pursuant to Section 69.612(a). This item is a negative amount."

Row 9002 - The instruction is revised to read, "Universal Service Fund expense allocation which is calculated pursuant to Sections 36.601-.641. Carriers with higher than average non-traffic-sensitive loop costs must report their interstate allocation, as reported to NECA for this reporting period in this row".

Row 9010 - The instruction is revised to read, "Total billable access lines in the study area include the following:

(1) the number of single line business customer premises terminations (CPTs) subject to the single line business interstate subscriber line charge, excluding company official, mobile radiotelephone and public telephone. CPTs are commonly referred to as 'main station equivalents' or 'billable units'. A CPT is a line termination at the customer premises, rather than at the central office; plus

(2) the number of residence lifeline CPTs for which the interstate subscriber line charge is reduced or waived. The decision to implement a lifeline plan is left to the individual state commission; plus

(3) the number of residence non-lifeline CPTs subject to the residence interstate subscriber line charge; plus

(4) the number of multiline business CPTs subject to the multiline business interstate subscriber line charge including, multiline semi-public lines, PBX trunks, Centrex CU trunks, hotel/motel LD trunks and Centrex CO lines ordered after July 27, 1983; plus

(5) the number of Centrex CO and CTX CO-like lines in service or ordered as of July 27, 1983; plus

(6) the number of special access lines subject to a $25 surcharge, including WATS lines, as appropriate, after June 1, 1986."

The specific changes to the column instructions are:

Column (i) - The description is revised to read, "*Total Common Line* - The total of columns (e) through (h), unless the row item is not apportioned among the common line subelements because of the aggregate carrier common line charge. In these instances, total common line will be the only field populated for common line and will not, therefore, equal the total of columns (e) through (h)."

Column (k) - The description is revised to read, "*Equal Access* - This amount includes only that portion of each row assigned to equal access pursuant to Part 36 of the Commission's Rules. This amount is directly assigned to Equal Access or is apportioned among the access elements pursuant to Part 69 of the Commission's Rules."

FOOTNOTES

[1] Automated Reporting Requirements for Certain Class A and Tier 1 Telephone Companies (Parts 31, 43, 67, and 69 of the FCC's Rules), 2 FCC Rcd 5770 (1987) (*ARMIS Order*), *recon.* 3 FCC Rcd 6375 (1988).

[2] *ARMIS Order*, 2 FCC Rcd at 5777.

[3] *See* Automated Reporting Requirements for Certain Class A and Tier 1 Telephone Companies (Parts 31, 43, 67, and 69 of the FCC's Rules), 4 FCC Rcd 4239 (Com. Car. Bur. 1989).

[4] MTS and WATS Market Structure, Amendment of Part 67 (New Part 36) of the Commission's Rules, 3 FCC Rcd 5518 (1988).

FOOTNOTE FOR APPENDIX

[1] For rows 7240 through 7260, these revisions are not effective until April 1, 1989. *See* Access Tariff Filing Schedules, *Report and Order*, 3 FCC Rcd 5495 (1988). Carriers must file according to the revisions for April 1, 1989 through December 31, 1989. For January 1, 1989 through March 31, 1989, carriers must attach a footnote containing these data as prescribed in the May 11, 1989 Access Report Order, DA 89-525.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications, Inc. — Transmittal Nos. 1782 and 1959

Revisions to Tariff F.C.C. No. 16

MEMORANDUM OPINION AND ORDER

Adopted: January 4, 1990; Released: January 5, 1990

By the Deputy Chief, Common Carrier Bureau:

1. The captioned tariff revisions, scheduled to become effective January 6, 1990, establish rates and regulations in AT&T's Tariff F.C.C. No. 16 (Competitively Bid Government Services) for State Outbound Calling Service (SOCS). AT&T states that SOCS is a custom-designed switched network service that provides outbound interstate and international calling for state owned and operated institutions of higher education and other state and local government agencies.[1] AT&T further states that, like its other Tariff 16 offerings, SOCS is available to governmental entities pursuant to Section 201(b) of the Communications Act, 47 U.S.C. § 201(b), which expressly permits the creation of a separate "Government" class of service. AT&T Tr. No. 1782, Description and Justification (D&J) at 1-2.

2. On September 25, 1989, MCI Telecommunications Corporation (MCI) filed a petition to reject or to suspend and investigate Transmittal No. 1782 (MCI Petition) and US Sprint Communications Company Limited Partnership (US Sprint) filed a petition to reject (US Sprint Petition). AT&T replied on October 5. On December 20, 1989, MCI filed a petition to reject or to suspend and investigate Transmittal No. 1959. ATC/Claydesta (Claydesta) filed a petition to reject that filing. MCI argues that Transmittal No. 1782 fails to comply with the cost support requirements of the Commission's Rules and should therefore be rejected. MCI Tr. 1782 Petition at 1-2. MCI also contends that the cost and demand data supplied with Transmittal No. 1959 is deficient. MCI Tr. 1959 Petition at 2-3. In addition, MCI urges that SOCS either should be subject to regulation under the Commission's price cap rules or that the costs and revenues of SOCS should be accounted for separately from other services. *Id.* at 3.

3. US Sprint argues that the limitation of SOCS to Michigan government customers is unreasonably discriminatory under Section 202(a) of the Communications Act and violates the Commission's policies favoring geographic rate averaging and prohibiting restrictions on resale. US Sprint Petition at 3-5. Further, US Sprint contends that SOCS is not eligible for inclusion in the "Government" class of services. *Id.* at 6-9; *see also* Claydesta Petition at 4-10. Finally, US Sprint agrees with MCI's assertion that the cost support material provided by AT&T is inadequate. US Sprint Petition at 10-13; Claydesta Petition at 2-3.

4. In reply, AT&T contends that the limitations petitioners believe should be imposed on "Government" services are not required by the Act. AT&T Tr. 1782 Reply at 2-3; AT&T Tr. 1959 Reply at 3-5. AT&T also asserts that SOCS neither constitutes impermissible rate deaveraging, nor does it restrict resale. AT&T Tr. 1782 Reply at 4-5. Finally, AT&T disputes petitioners' contentions that its cost support material is deficient. *Id.* at 5-6; AT&T Tr. 1959 Reply at 5-7.

5. The Common Carrier Bureau has reviewed the tariff revisions and the pleadings. We conclude that no compelling argument has been presented that the proposed tariff revisions are patently unlawful so as to require rejection, and that no question has been presented that warrants investigation at this time.

6. Accordingly, IT IS ORDERED that the petitions to reject or to suspend and investigate AT&T Communications, Inc., Tariff F.C.C. No. 16, Transmittal Nos. 1782 and 1959, filed by MCI Telecommunications Corporation, US Sprint Communications Corporation Limited Partnership, and ATC/Claydesta ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy)
Common Carrier Bureau

FOOTNOTE

[1] SOCS was developed in response to a competitive procurement conducted by the Michigan Collegiate Telecommunications Association (MCTA), an association of Michigan collegiate telecommunications administrators. SOCS was initially limited to Michigan state government customers under Transmittal No. 1782. By Transmittal No. 1959, however, AT&T expands SOCS to make it available to institutions of higher education owned and operated by any state or to any state or local government agency.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

VITELCOM CELLULAR, INC.,
Complainant,

v.

CARIBBEAN CELLULAR TELEPHONE, LTD d/b/a CCT BOATPHONE,
Defendant.

File No. E-90-39

ORDER

Adopted: January 9, 1990; Released: January 17, 1990

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On December 28, 1989, Vitelcom Cellular, Inc. (Vitelcom), complainant in the above-referenced formal complaint proceeding, filed a Motion for Extension of Time (Motion) pursuant to which Vitelcom would delay filing a Reply to the Answer filed by defendant Caribbean Cellular Telephone, Ltd. (CCT) on December 18, 1989. Vitelcom seeks a delay until seven (7) days following CCT's answer to interrogatories which Vitelcom served, also on December 28, 1989. For reasons set out herein, we deny the motion and instruct Vitelcom to file any Reply it wishes to file no later than January 16, 1990.

2. Vitelcom argues that CCT's Answer raised new issues of fact which necessitated its interrogatories and that, since these issues and the complaint itself cannot be resolved until the interrogatories are answered, grant of the motion will serve administrative efficiency by alleviating the necessity for Vitelcom to file additional pleadings after the answers to its interrogatories are served. We disagree. The procedural rules governing formal complaints were specifically designed to promote administrative efficiency while ensuring the development of an adequate record for decisionmaking. *See Amendment of Rules Governing Procedures to be Followed Where Formal Complaints Are Filed Against Common Carriers*, CC Docket No. 86-498, 3 FCC Rcd 1806 (1988). These rules provide for the filing of an Answer and a non-obligatory Reply to said Answer at dates certain computed as of the service of the formal complaint. *See* 47 C.F.R. §§ 1.724; 1.726. Interrogatories may be served, as of right, at any time during the period beginning with service of the complaint and ending 30 days after the Reply due date. 47 C.F.R. § 1.729(a). In other words, the rules clearly contemplate that interrogatories may, in the normal course, be served *after* the Reply is due. Interrogatories so served would, perforce, be answered after the Reply is due.

3. It is up to Vitelcom to ascertain, based on the answers tendered to its interrogatories, whether to file a motion, pursuant to 47 C.F.R. § 1.727, seeking leave to file any extraordinary pleading Vitelcom thinks warranted. Such a requirement conforms to the clear intent of our rules that the Reply date is triggered solely by the defendant's Answer and will not, in our judgment, introduce any untoward delay in the prosecution of this proceeding. Further, requiring complainant to file its Reply as required by the rules will not prejudice the complainant. To the extent complainant cannot reply to defendant's Answer -- including affirmative defenses included therein -- without reference to information it hopes to receive in answers to its interrogatories, complainant should so indicate in its Reply and it will not be deemed to have admitted any allegations made in such affirmative defenses. 47 C.F.R. § 1.726.

4. Accordingly, IT IS ORDERED, pursuant to authority delegated under 47 C.F.R. § 0.291, that Vitelcom's Motion for Extension of Time is DENIED and Vitelcom is directed to file its Reply, if any, in the above-referenced proceeding no later than January 16, 1990.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Hess
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: January 17, 1990

LOCAL EXCHANGE CARRIERS FILE REVISIONS TO THEIR COST ALLOCATION MANUALS

PUBLIC COMMENT INVITED

The following local exchange carriers filed proposed revisions to the cost categories of their permanent cost allocation manuals for the separation of regulated and unregulated costs for the quarter ended December 31, 1989: The Ameritech Operating Companies, Bell Atlantic, BellSouth Corporation, Central Telephone Company, Cincinnati Bell Telephone Company, GTE Telephone Operating Companies, Lincoln Telephone and Telegraph Company, Pacific Bell, Southern New England Telephone Company, Southwestern Bell Telephone Company, United Telephone System and U S WEST. The LECs filed their original manuals in 1987 pursuant to the requirements of the Commission's *Joint Cost Order*, 2 FCC Rcd 1298 (1987).

Parties may file comments on the proposed revisions to the cost manuals no later than **February 12, 1990.** Replies should be filed by **February 27, 1990.** A copy of each pleading should be sent to Alicia Dunnigan, FCC, Common Carrier Bureau, 2000 L Street, N.W., Room 812, Washington, D.C. 20554 and to International Transcription Services, Inc., 2100 M Street, N.W., Washington, D.C. 20036, (202) 857-3800. Copies are available for public inspection and copying in the Accounting and Audits Division public reference room, 2000 L Street, N.W., Room 812, Washington, D.C. Copies are also available from ITS.

For further information contact Alicia Dunnigan, (202) 634-1861.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN. Docket No. 89-478

In the Matter of

Mississippi Region
Public Safety Plan

ORDER

Adopted: January 10, 1990; Released: January 17, 1990

By the Chief, Private Radio Bureau and the Chief Engineer:

1. On September 18, 1989, the Mississippi Area (Region 23) submitted its public safety plan to the Commission for review. The plan sets forth the guidelines to be followed in allotting spectrum to meet current and future mobile communications requirements of the public safety and special emergency entities operating in its region.

2. The Region 23 plan was placed on Public Notice for comments on October 26, 1989, 54 FR 46298 (Nov. 2, 1989). The Commission received no comments in this proceeding.

3. We have reviewed the plan submitted for Region 23 and find that it conforms with the National Public Safety Plan. The plan includes all the necessary elements specified in the *Report and Order* in Gen. Docket No. 87-112, 3 FCC Rcd 905 (1987), and satisfactorily provides for the current and projected mobile communications requirements of the public safety and special emergency entities in Mississippi.

4. Accordingly, IT IS ORDERED that the Public Safety Radio Plan for Region 23 IS ACCEPTED. Furthermore, licensing of the 821-824/866-869 MHz band in Region 23 may commence immediately.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

Thomas P. Stanley
Chief Engineer

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: January 17, 1990

TWIXTEL TECHNOLOGIES, INC.
PETITION FOR DECLARATORY RULING

Twixtel Technologies, Inc. (Twixtel), a non-dominant resale interexchange carrier offering long distance telephone services, has filed a petition for declaratory ruling requesting that the Commission find that the telephone company/cable television cross-ownership restrictions of Section 63.54(a) of the Commission's rules, 47 C.F.R. § 63.54(a), and Section 613(b)(1) of the Cable Communications Policy Act of 1984, 47 U.S.C. § 533(b)(1), do not apply to non-dominant resellers of interexchange services.

Twixtel states the Commission has found some uncertainty exists concerning the application of the cross-ownership restrictions to interexchange carriers, including non-dominant, non-facilities based interexchange resellers such as Twixtel. *Further Notice of Inquiry and Notice of Proposed Rule Making*, CC Docket 87-266, 3 FCC Rcd 5849 (1988), ¶¶ 68-70. The Commission has not issued a definitive ruling on the subject, however, and issuance of a declaratory ruling to terminate this uncertainty would be appropriate, Twixtel states. Twixtel states that a prompt resolution of the issue is required to permit it to take advantage of opportunities to participate in joint ventures with cable operators. These joint ventures would offer interactive cable television, enhanced telecommunications, and long distance telephone services to currently unserved resort and rental markets, according to Twixtel, as more particularly described in its petition.

Twixtel states that the telco/cable cross-ownership restrictions cannot logically apply to interexchange resellers because (1) resellers do not provide local exchange telephone service and, therefore, do not have a "telephone service area" as contemplated by the restrictions, and (2) the policy underlying the cross-ownership restrictions is inapplicable to resellers because they are unable to inhibit cable development by manipulating access required by competitors or by improper cross-subsidization.

Interested parties may file comments on Twixtel's petition on or before **February 7, 1990,** and reply comments on or before **February 19, 1990.** Comments and reply comments should be filed with the Secretary, Federal Communications Commission, 1919 M. Street, N.W. Washington, D.C. 20554. A copy should be sent to International Transcription Services ("ITS"), 2100 M. Street N.W., Suite 140, Washington, D.C., 20037, the Commission's contractor for public records duplication. A copy of the Twixtel petition, and comments and reply comments when filed, can be obtained from ITS at (202) 857-3800. The Twixtel petition is, and comments and reply comments will be when filed, available for inspection and copying in the Public Reference Room, Domestic Facilities Division, Room 6220, 2025 M. Street, N.W. Washington, D.C. 20554, Monday -Thursday, 8:30 AM - 12:30 PM, 1:30 PM - 3:00 PM, (202) 634-1512.

For further information contact Patrick Donovan, Domestic Services Branch, Domestic Facilities Division, Common Carrier Bureau, (202) 634-1832.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

PORTA-PHONE, INC.
and PORTABLE
TELEPHONE
COMMUNICATIONS, INC.,

Complainants,

v.

RADIOCALL, INC.,	File Nos. E-89-71
SOUTH GEORGIA	E-89-72
COMMUNICATIONS, INC.,	E-89-73
PHENIX PAGING COMPANY,	E-89-74
and MOBILPHONE &	
BEEPER, INC.,	

Defendants.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Hess
Chief, Enforcement Division
Common Carrier Bureau

ORDER

Adopted: January 5, 1990; Released: January 17, 1990

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On January 9, 1989, Porta-Phone, Inc. and Portable Telephone Communications, Inc. (collectively referred to as Porta-Phone) filed the above-referenced formal complaints and requests for Order to Show Cause concerning alleged statutory and rules violations with respect to defendants' various Domestic Public Land Mobile Radio Service operations. The parties have subsequently conducted numerous discussions aimed at settling the complaints. As a result of these negotiations, a mutually agreeable settlement of all pending controversies between the parties was reached.

2. On December 8, 1989, counsel for Porta-Phone filed a motion to dismiss its complaints with prejudice. We are satisfied that dismissal of the complaints will serve the public interest by eliminating the need for further litigation and the expenditure of additional time and resources of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to authority delegated under 47 C.F.R. § 0.291, that the motion of Porta-Phone to dismiss the above-referenced complaints and requests for Order to Show Cause with prejudice IS GRANTED, and that the above-captioned proceeding IS TERMINATED.

Before the
Federal Communications Commission
Washington, D.C. 20554

GROUP W TELEVISION, INC. — CSG-89-093-ML

Application for authority to modify its fixed 7.0-meter Ku-band transmit/receive domestic fixed earth station (Call Sign E890522) at Stamford, Connecticut to add PAS-1 as a point of communication and to provide international communications between the United States and those points to which PAS is authorized to serve

WESTINGHOUSE COMMUNICATIONS SERVICES, INC. — CSG-89-122-ML

Application for authority to modify its fixed 4.5-meter C-band transmit/receive domestic earth station (Call Sign E890928) at Miami, Florida for the provision of international services via all U.S. domestic satellites

CRISA CORPORATION — CSG-89-145-P/L

Application for authority to construct and operate a 3.7-meter Ku-band transmit/receive fixed earth station for the provision of international communications between Laredo, Texas and Monterrey, Mexico via the Morelos I satellite

DALLAS/FORT WORTH TELEPORT, LTD. — CSG-89-150-ML

Application for authority modify its license for a fixed 6.1-meter Ku-band transmit/receive domestic earth station (Call Sign E873895) at Irving, Texas for the provision of private, non-common carrier international communications services via the PAS system

HUGHES NETWORK SYSTEMS, INC. — CSG-89-146-ML(2) CSG-89-147-ML(2)

Applications for authority to modify its licenses for 2.4, 1.8, 1.2 and 3.5-meter Ku-band transmit/receive VSAT earth stations (Call Signs E873438, E861092, E891001 and E891002) for the provision of services between the United States and Canada, Mexico and Latin America

MOBILE SATELLITE COMMUNICATIONS, INC. d/b/a/ PITTSBURGH INTERNATIONAL TELEPORT — CSG-89-151-ML(4)(A)

Application for authority to modify its licenses for a 5.6-meter hub at New Kensington, Pennsylvania and 1.2, 1.8 and 2.4-meter Ku-band transmit/receive earth stations (Call Signs E890954, E890955, E890956 and E890957) for the provision of services between the United States and Canada and Mexico via all U.S. domestic satellites and the Anik satellite system

HUGHES COMMUNICATIONS SATELLITE SERVICES, INC. CSG-89-152-ML(4)

Application for authority to modify its licenses for 1.2, 1.8, 2.4 and 3.5-meter Ku-band transmit/receive earth stations (Call Signs E890993, E890260, E890259 and E890261) for the provision of services between the United States and Canada, Mexico, Latin America and Caribbean countries via all U.S. domestic satellites

IDB COMMUNICATIONS GROUP, INC. CSG-89-153-ML

Application for authority to modify its license for a 3.5-meter fixed Ku-band transmit/receive earth station (Call Sign E860811) at Culver City, California for the provision of services between the United States and Canada, Mexico, the Caribbean, Central America and South America via all U.S. domestic satellites

IDB COMMUNICATIONS GROUP, INC. CSG-89-154-ML

Application for authority to modify its license for a 7.0-meter fixed C-band transmit/receive earth station (Call Sign E881143) at Culver City, California for the provision of services between the United States and Canada, Mexico, the Caribbean, Central America and South America via all U.S. domestic satellites and the Anik and Morelos satellite systems

MOBILE SATELLITE COMMUNICATIONS, INC. d/b/a/ PITTSBURGH INTERNATIONAL TELEPORT CSG-89-162-ML CSG-89-163-ML CSG-89-164-ML

Application for authority to modify its licenses for two 9.1 and one 9.2-meter C-band transmit/receive earth stations (Call Signs E890933, E871627 and E880053) for the provision of services between the United States and Canada and Mexico via all U.S. satellite systems

HUGHES AIRCRAFT COMPANY CSG-89-165-P/L

Application for authority to construct and operate a 5.0-meter fixed Ku-band transmit earth station at Long Beach, California for the provision of services between the United States and Mexico via the Morelos satellite system

COMMERCIAL TELECOMMUNICATIONS CORP. CSG-89-168-ML

Application for authority to modify its license for a 3.5-meter fixed Ku-band transmit/receive earth station at Santa Maria, California (Call Sign 890208) for the provision of services between the United States and Canada via all U.S. domestic satellites and the Anik system

MOBILE SATELLITE COMMUNICATIONS, INC. d/b/a/ PITTSBURGH INTERNATIONAL TELEPORT — CSG-89-169-ML

Application for authority to modify its license for a 5.6-meter fixed Ku-band transmit/receive earth station at New Kensington, Pennsylvania (Call Sign E890945) for the provision of services between the United States and Canada and Mexico via all U.S. satellite systems

DETROIT EDUCATIONAL TELEVISION FOUNDATION — CSG-89-172-ML

Application for authority to modify its license for a 10-meter fixed C-band transmit/receive earth station at Avon Township, Michigan (Call Sign WF67) for the provision of services between the United States and Canada and Mexico via all U.S. satellite systems, and the Anik and Morelos systems

GTE SPACENET CORPORATION — CSG-90-003-ML

Application for authority to modify a license for a 6.1-meter fixed Ku-band transmit/receive earth station hub at Peoria, Illinois (Call Sign E880635) for the provision of services between the United States and Canada and Mexico via all U.S. satellite systems

MOBILE SATELLITE COMMUNICATIONS, INC. d/b/a/ PITTSBURGH INTERNATIONAL TELEPORT — I-T-C-89-163

Application for authority to establish and operate channels of communication for the provision of services between the United States and Mexico and Canada

MEMORANDUM OPINION, ORDER AND AUTHORIZATION

Adopted: December 29, 1989; Released: January 17, 1990

By the Chief, International Facilities Division:

1. The Commission has under consideration the above-captioned applications requesting authority under Section 214 and Title III of the Communications Act of 1934, as amended, to establish channels of communications, modify existing domestic satellite earth station licenses, and construct new earth station facilities, to provide transborder services between the United States and Canada, Mexico, Latin America and the Caribbean. The Commission also has under consideration applications to modify existing earth station licenses to add the PAS-1 satellite as a point of communications to provide service between the United States and points to which Alpha Lyracom (d/b/a/ Pan American Satellite (PAS)) is authorized to serve. These applications were placed on the Commission's public notice. No comments were received.

THE APPLICATIONS

2. *Group W Television, Inc. (Group W) (File No. CSG - 89 - 093 - ML).* Group W seeks authority to modify one of two identical, co-located, fixed 7.0-meter Ku-band transmit/receive domestic fixed earth stations (Call Sign E890522) at Stamford, Connecticut, to add the PAS-1 satellite as a point of communication to provide international communications between the United States and those European points to which PAS is authorized to serve. The modifications will extend the range of technical parameters of the satellite arc to 45 - 140 degrees West Longitude; the antenna elevation angle to 8.9 - 34.3 degrees; and the earth station azimuth to 140.4 - 254.0 degrees from True North. The antenna which will be used to access PAS-1 will be the eastern antenna of the two which are located on the easterly end of the roof of the building known as 250 Harbor Plaza Drive. Also, the number of antennas shown on Group W's license is hereby corrected at "Item number 5" to show "two" antennas instead of "six". All other particulars of operation remain the same.

3. Group W states that its use of the PAS-1 satellite will not be pursuant to any direct contractual arrangement between it and PAS. Rather, Group W explains, the entities for whom it will provide uplink and/or downlink services will obtain transponder capacity over PAS-1 pursuant to either an underlying sale or long-term lease agreement for at least one year. Group W states that such arrangements will not involve communications interconnected with the public switched message network in conformance with the *Separate Systems* decision.[1]

4. *Westinghouse Communications Services, Inc. (Westinghouse) (File No. CSG - 89 - 122 - ML).* Westinghouse seeks authority to modify its fixed 4.5-meter C-band transmit/receive domestic earth station (Call Sign E890928) at Miami, Florida for the provision of international services via all U.S. domestic satellites. Westinghouse states that it will operate the facility pursuant to a contract with the Department of Treasury to provide non-common carrier services for the U.S. Customs Service between the Customs Service's Command, Control, Communications and Intelligence Center in Miami and an

earth station facility that will be operated by Westinghouse at the Customs Service's facility in George Town, Bahamas. Westinghouse states that the facilities will be used in conjunction with the Customs Service's aerostat-born radar system in carrying out the Customs Service's drug interdiction responsibilities. Westinghouse states further that because the facility will be used solely for national security purposes, the Department of State has indicated that pursuant to Article XIV(g) of the INTELSAT Agreement, consultation with INTELSAT is not required.

5. *Crisa Corporation (Crisa) (File No. CSG - 89 - 145 - P / L).* Crisa seeks authority to construct and operate a 3.7-meter Ku-band transmit/receive fixed earth station for the provision of international communications between Laredo, Texas and Monterrey, Mexico via the Morelos I satellite. Crisa is a wholesale glass distributor in the United States that is wholly-owned by the Mexican group Vitro S.A. Crisa proposes to provide private, point-to-point digital communications between its U.S. location and its Mexican affiliate in Monterrey.

6. *Dallas / Fort Worth Teleport, Ltd. (DFWT) (File No. CSG - 89 - 150 - ML).* DFWT seeks authority to modify a 6.1-meter Ku-band transmit/receive domestic earth station (Call Sign E873895) at Irving, Texas for the provision of private, non-common carrier, international communications services via the PAS-1 satellite. The modifications will extend the range of technical parameters of the satellite arc to 40-143 degrees West Longitude; the antenna elevation angle to 18-40.1 degrees and the earth station azimuth to 109.4-242.2 degrees from True North. DFWT provides domestic common carrier services through facilities also located at this location, but states that the international authority it seeks is for private, non-common carrier, international services. DFWT states that its access to PAS will allow expansion of the types of services that can be offered to its customers.

7. *Hughes Network Systems, Inc. (HNS) (File Nos. CSG - 89 - 146 - ML (2) and CSG - 89 - 147 - ML (2)*). HNS seeks authority to modify its licenses to add 1.2, 1.8, 2.4 and 3.5-meter Ku-band transmit/receive very small aperture terminal (VSAT) earth stations (Call Signs E873438, E861092, E891001 and E891002) for the provision of extra high-speed data, one-way video and digitized voice services between the United States and Canada, Mexico and certain Latin American points, as well as two-way service between the United States and Canada and Mexico via all satellites which have been or will be consulted under Article XIV(d) of the INTELSAT Agreement. HNS states that after the proposed modification to its license, it would then be licensed to operate a VSAT network with up to 800 2.4-meter terminals, 100 1.8-meter terminals, 50 1.2-meter terminals and 100 3.5-meter terminals operating in point-to-point or point-to-multipoint configurations. HNS states that its earth stations are designed for users with fewer sites than the typical VSAT customer. HNS adds that the services provided via these terminals can be more economical because they use less transponder capacity and do not require a hub to operate. In this manner, HNS states it can offer flexible services and rates dependent upon the needs of its customers.

8. *Mobile Satellite Communications, Inc., d / b / a Pittsburgh International Teleport (MSC) (File Nos. CSG - 89 - 151 - ML (4) (A), CSG - 89 - 162 - ML, CSG - 89 - 163 - ML, CSG - 89 - 164 - ML, CSG - 89 - 169 - ML and I-T-C-89-163).* MSC was formed in 1983 as a domestic, non-dominant carrier to provide satellite communications services, including video and data services to businesses across the United States. The privately held company has its headquarters in New Kensington, Pennsylvania and is incorporated under the laws of Pennsylvania. MSC states that it currently operates satellite earth station and terrestrial microwave facilities for domestic communications. MSC currently operates a teleport facility near Pittsburgh, Pennsylvania offering satellite uplink/downlink and associated services for numerous customers. In File No. CSG-89-151-ML(4)(A), MSC seeks authority to modify its license for a 5.6-meter hub at New Kensington, Pennsylvania and 200 1.2-meter, 825 1.8-meter, and 275 2.4-meter fixed Ku-band VSAT transmit/receive earth stations (Call Signs E890954, E890955, E890956 and E890957) to add all Ku-band satellites, including the Anik satellite system, which have been consulted under Article XIV(d) of the INTELSAT Agreement for the provision of two-way data transmissions between the United States and Canada and Mexico.

9. In File Nos. CSG-89-162-ML, CSG-89-163-ML and CSG-89-164-ML, MSC seeks authority to modify its licenses for two 9.1-meter and one 9.2-meter C-band transmit/receive earth stations (Call Signs E890933, E871625 and E880053) to add all C-band satellites which have been or will consulted under Article XIV of the INTELSAT Agreement for the provision of transborder services between the United States and Canada and Mexico. MSC states that it will provide on a "for-hire" basis uplink video distribution and teleconferencing services from remote locations where fixed facilities are not available. MSC adds that it will be able to serve a growing need of television program producers, television stations and others for instantaneous transmission of programming from the location of live events and remote production locations.

10. In File No. CSG-89-169-ML, MSC seeks authority to modify its license for a 5.6-meter fixed Ku-band transmit/receive earth station at New Kensington, Pennsylvania (Call Sign E890945) to add all Ku-band satellites that have been consulted under Article XIV(d) of the INTELSAT Agreement for the provision of two-way video services between the United States and Canada and Mexico.

11. In File No. I-T-C-89-163, MSC seeks authority to establish and operate channels of communication between earth stations in the United States and Mexico and Canada for the provision of two-way, high-speed data and video services. MSC states that it will use all domestic satellites which have been or will be consulted under Article XIV(d) of the INTELSAT Agreement to provide the proposed services. MSC states that it does not seek to construct or procure any circuits of its own other than the satellite facilities it has identified. MSC states that existing international facilities and services are inadequate for the services it proposes to offer and that entry by it and additional satellite radio carriers will further stimulate demand for such service and encourage more efficient services at lower cost.

12. *Hughes Communications Satellite Services, Inc. (HCSS) (File No. CSG - 89 - 152 - ML (4)*). HCSS seeks authority to modify its licenses for 1.2, 1.8, 2.4, and 3.5-meter Ku-band transmit/receive earth stations (Call Signs E890993, E890260, E890259 and E890261, respectively) for the provision of services between the United States and Canada and Mexico via all U.S. domestic sat-

ellites. HCSS proposes to provide high-speed data, one-way video and digitized voice transmissions to Canada, Mexico, Latin America and Caribbean countries, as well as two-way services between the United States and Canada and Mexico. HCSS states that it will use these "Gemini" terminals in a point-to-point or point-to-multipoint configuration, consisting of up to 5850 terminals.

13. *IDB Communications Group, Inc. (IDB) (File Nos. CSG - 89 - 153 - ML and CSG - 89 - 154 - ML).* In File No. CSG-89-153-ML, IDB seeks authority to modify its license for a 3.5-meter fixed Ku-band transmit/receive earth station (Call Sign E860811) at Culver City, California for the provision of services between the United States and Canada, Mexico, the Caribbean, Central America and South America via all U.S. domestic satellites. In File No. CSG-89-154-ML, IDB seeks authority to modify its license for a 7.0-meter fixed C-band transmit/receive earth station (Call Sign E881143) at Culver City, California for the provision of services between the United States and Canada, Mexico, the Caribbean, Central America and South America via all U.S. domestic satellites and the Anik and Morelos satellite systems. IDB currently uses these earth stations to transmit audio or video programming, and/or data communications and to distribute such programming through national satellite distribution channels.

14. *Hughes Aircraft Company (HAC) (File No. CSG - 89-165-P/L).* HAC, is a wholly-owned subsidiary of General Motors Hughes Electronics, which is, in turn, a wholly-owned subsidiary of General Motor Corporation. HAC seeks authority to construct and operate a 5.0-meter fixed Ku-band transmit/receive earth station at Long Beach, California for the provision of services between the United States and Mexico via the Morelos satellite system. HAC states that the earth station will be installed, operated and maintained by its staff organization, Communications and Data Processing (C&DP). HAC states C&DP operates under the umbrella of the Executive and Corporate Staff Organizations (E&SCO) of HAC. C&DP offers, among other services, private digital data, voice and video telecommunications for HAC. HAC states that the instant application stems from requests of other operating divisions that have manufacturing functions in Tijuana and Mexicali, Mexico to C&DP to permanently improve the currently inadequate voice and data terrestrial communications links now existing between the U.S. domestic parent divisions and their Mexican manufacturing functions. HAC states that this earth station will allow it to offer consistent and uninterrupted communication services to its manufacturing sites in Mexico, thus greatly increasing their productivity and competitiveness. HAC adds that the public interest of both the United States and Mexico will be served by improving the quality of service currently available.

15. *Commercial Telecommunications Corp. (Comtel) (File No. CSG - 89 - 168 - ML).* Comtel seeks authority to modify its license for a 3.5-meter fixed Ku-band transmit/receive earth station at Santa Maria, California (E890208) for the provision of services between the United States and Canada via all U.S. domestic satellites and the Anik satellite system. Comtel states that this earth station will be used as part of its corporate communication network for communication with other nodes in Canada.

16. *Detroit Educational Television Foundation (DETV) (File No. CSG - 89 - 172 - ML).* DETV seeks authority to modify its license for a 10-meter fixed C-band transmit/receive earth station at Avon Township, Michigan (Call Sign WF67) to use all U.S. domestic satellites, the Anik and Morelos satellite systems for the provision of transborder services on a non-common carrier basis between the United States and Canada and Mexico and all countries for which INTELSAT Article XIV(d) consultations have been completed.[2] Specifically, DETV proposes to provide transborder video and associated audio transmission and reception services which will support its own programming needs and provide service to third parties on a private, cost-sharing basis.

17. *GTE Spacenet Corporation (GTE Spacenet) File No. CSG - 90 - 003 - ML).* GTE Spacenet seeks authority to modify its license for a 6.1-meter fixed Ku-band transmit/receive earth station hub at Peoria, Illinois (Call Sign E880635) for the provision of data, video or digital voice and other approved two-way transborder services between the United States and Canada and Mexico via all U.S. satellite systems. GTE Spacenet states this 6.1-meter facility operates as a customer premise hub earth station and is currently used domestically for GTE Spacenet's customer in a private communications network which uses GTE Spacenet's authorized multi-satellite system to provide a mix of high-speed voice, data and video services. GTE Spacenet states that its customer requires transborder links to Canada and Mexico and adds that only authorized satellites will be used for services within the scope of consultations under Article XIV(d) of the INTELSAT Agreement.

DISCUSSION

18. In 1981, following consultations with the Department of State, the Commission conditionally approved the use of U.S. domestic satellites for the transmission of certain public international telecommunications services to points within the footprint of those satellites. The Commission determined that domestic satellites could be used for these services where INTELSAT is incapable of providing a service or where it would be clearly uneconomical or impractical to use the INTELSAT system for the service. Based on these criteria, the Commission has authorized over 200 applications for transborder service between the United States and Canada, Mexico, Latin America and the Caribbean locations. In addition, consultations under Article XIV(d) of the INTELSAT Agreement have been successfully completed for the provision of transborder services to several countries. [3]

19. The subject applications request authority to provide services similar to those services previously authorized under the Commission's Transborder policy and consulted under Article XIV(d) of the INTELSAT Agreement. For the most part, the applications involve the modification of domestic earth station licenses to extend existing or planned domestic networks to provide business and video services between the United States and Canada and Mexico using U.S. domestic satellites, as well as the Anik and Morelos satellites.

20. Under these circumstances, we conclude that a grant of the subject applications involving transborder services is consistent with the Commission's Transborder policy and consultations completed under Article XIV(d) of the INTELSAT Agreement. The Commission has pre-

viously recognized that where the extension of existing domestic business networks is involved, use of the INTELSAT system would be both clearly impractical and uneconomical.[4] Specifically, the Commission has noted that maximum efficiency is gained through use of one satellite to link a customer's numerous business locations simultaneously. Use of the INTELSAT system would require the virtual duplication of a domestic network for each customer that wanted to add Canadian or Mexican business locations to its network.

21. The same considerations also apply to the receive-only video services where the programming is already being transmitted throughout the United States and can be received in transborder locations on an incidental basis with the addition of small, receive-only earth stations for little or no additional cost.[5] The incidental reception of this programming in transborder locations is consistent with our Transborder policy and existing INTELSAT consultations. In addition, the Commission has found that use of INTELSAT facilities in such circumstances would be an inefficient use of the available radio frequency spectrum. With respect to point-to-point communications between the U.S. and Canada and Mexico, the Commission has granted applications based on the recognition that such service was not previously provided by INTELSAT but by well-developed terrestrial networks.

22. Although we find that the subject applications comply with the Commission's Transborder policy, we note that two of the applications present technical questions and can only be granted subject to certain limitations. With respect Crisa's application (File No. CSG-89-145-P/L) to construct a 3.7-meter Ku-band transmit/receive fixed earth station, we note that the proposed antenna does not meet the requirements for side lobes emissions and two degree spacing in accordance with Section 25.209 of the Commission's Rules. Therefore, the earth station shall be limited to a total effective isotropic radiated power (e.i.r.p.) of 51.7 dBW and an e.i.r.p. power density of 30.6 dBW/4kHz. The earth station shall transmit in the frequency band 14-14.5 GHz and receive in the frequency band 11.7-12.2 GHz and emissions shall be limited to 400KG7D. With respect to the application of DFWT (File No. CSG-89-150-ML), the total maximum e.i.r.p. shall be limited to 83.5 dBW and the maximum e.i.r.p. density shall be limited to 56.5 dBW/4kHz.

23. We also note that the application of Westinghouse (File No. CSG-89-122-ML) to use its 4.5-meter C-band transmit/receive earth station at Miami, Florida to provide service between the U.S. and the Bahamas to the the U.S. Customs Service does not properly fall within our Transborder policy. The State Department has declared that this service is solely for national security purposes within the meaning of Article XIV(g) of the INTELSAT Agreement, which provides that the Agreement does not apply to such communications.[6] Thus, the services provided pursuant to this application are not limited to those services and satellites set forth in Attachments 1 and 2.

24. Further, we find that the applications of DFWT (File No. CSG-89-150-ML) and Group W (File No. 89-093-ML) are consistent with the Commission's *Separate Systems* decision which permits the access of the PAS separate satellite system subject to the limitations contained in the *Separate Systems* decision. On several occasions the Commission has authorized PAS to operate its facilities for communications between the U.S. and specified countries once it was determined that U.S. obligations under Article XIV(d) of the INTELSAT Agreement had been fulfilled.[7] The instant applications seek authority to access the PAS system to provide services to those countries which PAS is authorized to serve. In view of these circumstances, we conclude that the grant of these applications is consistent with the Commission's *Separate Systems* policy and will serve the public interest.

25. Accordingly, IT IS ORDERED that the applications of Westinghouse (File No. CSG-89-122-ML), Crisa (File No. CSG-89-145-P/L), HNS (File Nos. CSG-89-146-ML(2) and CSG-89-147-ML(2)) MSC (File Nos. CSG-89-151-ML(4)(A), CSG-89-162-ML, CSG-89-163-ML, CSG-89-164-ML, CSG-89-169-ML and I-T-C-89-163), HCSS (File No. CSG-89-152-ML(4)), IDB (File Nos. CSG-89-153-ML and CSG-89-154-ML), HAC (File No. CSG-89-165-P/L), Comtel (File No. CSG-89-168-ML), DETV (File No. CSG-89-172-ML) and GTE Spacenet (File No. CSG-90-003-ML) ARE GRANTED and the applicants are authorized to modify the licenses for their existing earth station facilities, construct new earth station facilities and/or establish channels of communication to provide the transborder services requested in their applications consistent with Attachments 1 and 2.

26. IT IS FURTHER ORDERED that Crisa may not provide common carrier services through the earth station facilities authorized herein and none of the earth stations authorized herein to provide private service shall be used to provide common carrier services.

27. IT IS FURTHER ORDERED that the applications of Group W (File No. CSG-89-093-ML) and DFWT (File No. CSG-89-150-ML) ARE GRANTED and the existing earth station licenses of Group W and DFWT are hereby modified to add the PAS-1 satellite as a point of communication for service between the United States and those countries that PAS is authorized to serve.

28. IT IS FURTHER ORDERED that Group W and DFWT are restricted in their operation of the subject earth stations communicating with the PAS-1 satellite to the provision of capacity through the sale or long-term lease (of at least one year) of transponder capacity for communications not interconnected with the public-switched message networks (except for emergency restoration service).

29. IT IS FURTHER ORDERED that the authorizations of Group W and DFWT are subject to Commission jurisdiction over the use of all space segment within the PAS system and operation of the proposed earth stations to ensure compliance with the restrictions stated.

30. IT IS FURTHER ORDERED that Group W and DFWT are restricted to operation of the proposed earth station in accordance with the parameters summarized and conditions described in Attachment No. 1 to AP-11-10E, "Report by the Board of Governors to the Eleventh Assembly of Parties Pursuant to Article XIV(d) on the PanAmSat Network" (February 1987).

31. This authorization constitutes the final step with respect to the provision of transborder services only insofar as the U.S. regulatory process is concerned. It does not, however, dispense with any requirements that may be imposed by other countries involved.

32. This order shall not be construed as authorizing the distribution of programming where the appropriate copyright clearances have not been obtained.

33. IT IS FURTHER ORDERED that before completion of equipment installation and facility activation, Crisa and HAC shall provide the Commission with a summary of equipment which was actually installed.

34. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

ATTACHMENT 1

U.S. Satellites Consulted Pursuant to Article XIV(d)

Satellites

AURORA (SATCOM V)
COMSTAR D-4
CONTEL ASC-I
CONTEL ASC-II
GALAXY I
GALAXY II
GALAXY III
GALAXY IV-R
GALAXY V-R
GALAXY VI (WESTAR VI-S)
GSTAR I
GSTAR II
GSTAR III
SATCOM IR
SATCOM IIR
SATCOM IIIR
SATCOM IV
SATCOM V
SATCOM K-1
SATCOM K-2
SBS I
SBS II
SBS III
SBS IV
SBS V
SBS VI
SPACENET I
SPACENET II
SPACENET III
TELSTAR 301 (TELSTAR 3A)
TELSTAR 302
TELSTAR 303
WESTAR IV
WESTAR V

ATTACHMENT 2

SUMMARY OF INTELSAT CONSULTATION

Country	Service[s]	Satellite[s]
Anguilla	T.V., audio and data receive-only	all satellites listed in Attachment 1
Bahamas	T.V., audio and data receive-only	all satellites listed in Attachment 1
Barbados	T.V. receive-only	all Galaxy, Satcom and Westar satellites listed in Attachment 1
Bermuda	T.V., audio and data receive-only	all satellites listed in Attachment 1
British Virgin Islands	T.V., audio and data receive-only	all satellites listed in Attachment 1
Canada	occasional pt.-to-pt. and full time video services and business services (including data and electronic document distribution, video teleconferencing and voice communications)	all satellites listed in Attachment 1 plus ANIK B, C1, C2, C3, D1 and D2
Cayman Islands	T.V., audio and data receive-only	all satellites listed in Attachment 1
Mexico	Full-time and occasional T.V. services, receive-only audio and business services (including data and electronic document distribution, video teleconferencing and voice communications)	all satellites listed in Attachment 1 plus the Morelos I and II satellites
Monsterrat	T.V., audio and data receive-only	all satellites listed in

		Attachment 1
Netherlands Antilles	T.V. receive-only	Galaxy I, Satcom III-R and IV, Westar IV and V and Comstar D4
Turks & Caicos	T.V., audio and data receive-only	all satellites listed in Attachment 1
Venezuela	T.V. receive-only	all satellites listed in Attachment 1

Notes

1) With the exception of Mexico and Canada, which were consulted separately, all services (i.e. T.V., audio and data receive-only) can be provided to any point over any of the satellites listed in Attachment 1 even through only certain services and satellites were initially requested. This can be accomplished through notifying INTELSAT with no additional consultation required.

2) Attachment 1 contains only those satellites that have been technically consulted with INTELSAT.

3) All services authorized to Latin American/Caribbean locations are receive-only (i.e. can be received as a by-product of or incidental to U.S. domestic transmissions).

4) Attachment 2 does not contain all of the Latin American/Caribbean countries which have been included in previous charts. Attachment 2 contains only those countries that associated with the most recent INTELSAT Article XIV(d) consultation in October 1989 (AP-15-23E). Other countries will be added to the list once they associate with that consultation.

FOOTNOTES

[1] 100 FCC 2d 1046 (1985), *recon.* FCC 86-144, April 17, 1986, *further recon.* 1 FCC Rcd 439 (1986).

[2] Although DETV requests authority to add the Anik satellite system to its existing domestic earth station license, it does not appear that such authority is necessary in light of DETV's previous authorization to use this station to communicate with the Anik satellite system to provide transborder service between the U.S. and Canada. *See* American Telephone and Telegraph Company, *et al.*, 1 FCC Rcd 72 (1986).

[3] *See* Attachments 1 and 2.

[4] Satellite Business Systems, 88 FCC 2d 195 (1981).

[5] Transborder Satellite Video Services, 88 FCC 2d 258 (1981). The same considerations are applicable where Canadian and Mexican domestic video services are received in the U.S.

[6] *See* GE American Communications, Inc., 4 FCC Rcd 6351 (1989); and GTE Spacenet Corporation, 4 FCC Rcd 8183 (1989).

[7] *See* Alpha Lyracom, d/b/a Pan American Satellite, DA 89-1604 (released December 18, 1989). PAS is authorized to provide service between the United States and Argentina, the Bahamas, Bolivia, Brazil, Chile, Colombia, Costa Rica, Denmark, the Dominican Republic, Ecuador, Federal Republic of Germany, France, Guatemala, Honduras, Ireland, Italy, Luxembourg, Monaco, the Netherlands, Peru, Portugal, Sweden, and the United Kingdom.

Before the
Federal Communications Commission
Washington, D.C. 20554

MCI TELECOMMUNICATIONS
CORPORATION
Complainant,

v. File No. E-89-194

SOUTHWESTERN BELL TELEPHONE
COMPANY
Defendant.

ORDER

Adopted: January 4, 1990; Released: January 17, 1990

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On May 16, 1989, MCI Telecommunications Corporation filed a formal complaint against Southwestern Bell Telephone Company (Southwestern Bell) alleging that Southwestern Bell's charges for interstate access services for 1987 resulted in earnings in excess of its authorized rate of return and were thus unlawful. On December 19, 1989, the above-listed parties filed a Stipulation for Dismissal in which they state that all claims in this matter have been compromised and settled and request that the Commission dismiss the complaint with prejudice.

2. We are satisfied that dismissal of the complaint will serve the public interest by eliminating the expenditure of further time and resources.

3. Accordingly, IT IS ORDERED, pursuant to authority delegated under 47 C.F.R. § 0.291, that the request for dismissal of the above-captioned complaint IS GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned complaint IS DISMISSED WITH PREJUDICE and the proceedings ARE TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Hess
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Ameritech Operating Companies Revisions to Tariff F.C.C. No. 2	Transmittal Nos. 376, 377, 378, 379, 381, 382, 383, 386, 387, 389, and 390
Nevada Bell Telephone Company Revisions to Tariff F.C.C. No. 1	Transmittal No. 90
Pacific Bell Telephone Company Revisions to Tariff F.C.C. No. 128	Transmittal Nos. 1429 and 1433

ERRATUM

Released: January 17, 1990

By the Deputy Chief, Common Carrier Bureau:

1. Nevada Bell Telephone Company Tariff F.C.C. No. 1, Transmittal No. 90, was inadvertently included in an Order adopted by the Common Carrier Bureau in the captioned proceeding, DA 90-1, released Jan. 3, 1990, which rejected certain proposed tariff revisions. That Order is hereby corrected so that its terms are not applicable to Nevada Bell Telephone Company Tariff F.C.C. No. 1, Transmittal No. 90.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief, (Policy)
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications Tariff F.C.C. Nos. 1, 9, and 10	**CC Docket No. 85-203** Transmittal No. 321
Tariff F.C.C. Nos. 1, 2, 9, and 10	**CC Docket No. 85-326** Transmittal Nos. 434, 435

MEMORANDUM OPINION AND ORDER

Adopted: December 20, 1989; Released: January 17, 1990

By the Commission:

I. INTRODUCTION

1. This Commission initiated investigations of American Telephone and Telegraph Company's (AT&T) Software Defined Network Service (SDN) and Megacom and Megacom 800 Services (Megacom) in separate Orders (*Investigation Order*, *SDN Order* and *Megacom Order)* released in 1985.[1] In these Orders, the Commission designated for investigation certain issues raised by AT&T's tariffs for the services and instructed the Common Carrier Bureau (the Bureau) to seek data from AT&T regarding its operating experience with the services. The Bureau obtained such data and provided an opportunity for comment by interested parties. We have analyzed the information and pleadings filed in these dockets. Based on that analysis, we conclude that AT&T's tariff provisions for both Megacom and SDN are lawful. Accordingly, we terminate these investigations and accounting orders initiated therein.

II. BACKGROUND

A. *Software Defined Network Service*

2. SDN is a so-called "virtual" private line service provided via AT&T's public switched network facilities. With SDN, a customer receives the features of a dedicated private network although the service is delivered over AT&T's shared switched facilities. The standard features of SDN service are station-to-station calling, a separate numbering plan for points on the customer's SDN network, and the availability of "off"-network calling, *i.e.*, calling to points on the public switched network using the North American Numbering Plan. Customers access AT&T's network by obtaining special access or switched access services from the local exchange carriers (LECs). AT&T's present rate structure for SDN contains a combination of usage-based rates, flat-rated recurring charges, and nonrecurring charges.

3. AT&T initially submitted its SDN tariff on March 6, 1985. A number of petitions were filed opposing the tariff filing. The petitioners claimed that despite the fact that SDN Service and MTS/WATS use the same switched network facilities, the rates for SDN Service were lower than those for MTS/WATS services. Therefore, the petitioners alleged, the SDN rates were unreasonably discriminatory within the meaning of § 202(a) of the Communications Act, 47 U.S.C. § 202 (a). In its June 1985 *Investigation Order*, the Bureau stated that in order to resolve the rate discrimination issue, it must determine whether SDN service represents an appropriate bundling together of service components. The Bureau also concluded that even if this question could be answered in the affirmative, the proposed rate structure had to be based on a consistent treatment of like service components. The Bureau found, however, that it did not have sufficient information at the time to make these determinations. *Investigation Order* at paras. 19-20.

4. The petitioners against the SDN filing also alleged that SDN Service would result in uneconomic bypass. In response to these allegations, the Bureau stated in the *Investigation Order* that its determination of the rate discrimination issue would depend in part upon whether the offering of SDN Service resulted in a significant level of uneconomic bypass. *Id.* at para. 25. In this regard the Bureau stated that it required information regarding cross-elasticities among SDN, AT&T's MTS/WATS services, and the equivalent services provided by the OCCs and the specialized carriers in order to determine which customers are switching to SDN Service from what other types of services. *Id.*

5. In light of the questions raised regarding the lawfulness of SDN Service, the Bureau's *Investigation Order* suspended the tariff[2] and set it for investigation. The Bureau asked parties to address whether SDN Service is like MTS or WATS and whether any differences between the services justify differences in their rates. In addition, the Bureau requested information regarding the cross-elasticities between different types of services and SDN Service. *Id.* at paras. 25-26, 33.

6. In the *SDN Order* released five months later, this Commission was able to resolve the bypass and unbundling issues. We found that the "uncontroverted evidence in the record before us indicates that no significant level of uneconomic bypass would result from introduction of SDN Service." *SDN Order*, 103 FCC 2d at 166. We therefore determined that the bypass threat posed by the introduction of SDN Service was not a sufficient basis for finding the proposed tariff revisions unlawful and terminated the existing investigation into the bypass issues. *See id.* at 170. Nevertheless, since several parties challenged the reliability of AT&T's demand projections, as they related to bypass, this Commission agreed to exercise our authority under Section 218 of the Communications Act, 47 U.S.C. § 218, to require periodic reports from AT&T in order to "monitor the actual shifts in demand and the extent of any bypass resulting from the introduction of SDN service." *Id.* at 167.

7. With respect to the unbundling issue, we determined in the *SDN Order* that while SDN Service provides both transmission facilities and network management features, it would not be technically or economically feasible to offer the service on an unbundled basis. *Id.* at 161-62. Therefore we concluded that the combination did not constitute unlawful bundling, and we terminated the investigation on the issue of unbundling. *Id.*

8. While this Commission was able to dispose of the unbundling and bypass issues in the *SDN Order*, we could not resolve, and therefore continued, the investigation of the rate discrimination issue. This Commission noted that its investigation uncovered differences in the cost of providing SDN Service which might justify differences in the rates for SDN, MTS, and WATS services. We also stated that the existence of lower-priced competitive alternatives in both the virtual private line and MTS/WATS markets was relevant to any determination as to whether the proposed offering was unreasonably or unjustly discriminatory. *Id.* at 163. However, we concluded that the "additional information regarding costs, operational efficiencies, revenues, and demand that is required to make a final determination of the reasonableness of the proposed rates will become available only after actual operating experience with the service." *Id.* at 163-64. Accordingly, this Commission instructed the Bureau to request additional information from AT&T regarding the actual performance -- both technical and financial -- of the service after it had been in operation for one year. This Commission also instituted an accounting order. *Id.* at 170 & n. 13.

9. On December 15, 1986, pursuant to the *SDN Order's* directive to obtain additional information pertinent to the discrimination issue, the Bureau sent an information request to AT&T (SDN Letter). [3] Specifically, the letter requested information regarding demand and revenues, cross-elastic effects and service installation costs.[4] AT&T filed its response on January 16, 1987 (1987 SDN Report).[5] In the 1987 SDN Report, AT&T indicated that demand for the service and revenue produced by SDN failed to reach the levels it forecast for 1986 on an actual or annualized basis. The 1987 SDN Report also provided data on the cross-elastic effects of SDN Service on WATS and private line services, showing the amount of messages, minutes and revenues that migrated from WATS to SDN, and the number of inter-office channel sections and revenues which were transferred from private line to SDN. AT&T stated that the overall cross-elastic effects of SDN on WATS and private line service were minimal in relation to overall demand in 1986 for these services. According to AT&T, only 18.627 million WATS minutes of use in 1986 were transferred to SDN Service. *Id.* at 7-8 & Table 2.[6] Finally, AT&T reported that the average cost per network of installing the basic SDN Service had been reduced, due to experience gained and improvements in implementation. *Id.* at 10-11.

B. ***Megacom and Megacom 800 Services***

10. Megacom is a distance- and usage-sensitive outward dialing service. Calls are rated individually based on the distance of each call. Megacom 800 is a distance- and usage-sensitive, inward dialing service. Its customers are able to define the geographic areas, by specific NPA, from which they will receive calls. Both Megacom and Megacom 800 are provided from certain AT&T Class 4ESS switches specified in its Tariff F.C.C. No. 10. Customers obtain access to AT&T's network through local exchange carrier special access tariffs, through AT&T Tariffs 9 and 11, or via the customers' own facilities. At the time Megacom was introduced in 1985, there was a $1,200 monthly charge for Megacom and Megacom 800 services.

11. A number of parties filed petitions to suspend or reject the Megacom tariff, claiming that Megacom "encourages bypass of local exchange facilities by exploiting regulation-mandated pricing disparaties between special and switched access." *Megacom Order* at para. 3. This Commission rejected the argument, finding that the petitioners had not demonstrated that any bypass that may result from the offering of Megacom would be sufficient to cause economic harm to local exchange carriers. *Id.* at 7. The petitioners also raised a number of rate structure issues which we found meritless. Specifically, we found that the petitioners had not substantiated claims that the $1,200 monthly recurring charge for Megacom was unreasonably discriminatory or that Megacom was unlawful because it offered a lower usage rate for service which was "like" other, higher priced services. *Id.* at 12 (para. 31).

12. Finally, the petitioners questioned the adequacy and accuracy of AT&T's tariff support materials. Specifically, they asserted that AT&T's tariff support material did not satisfy the requirements of Section 61.38 of the Commission's Rules, 47 C.F.R. § 61.38. The petitioners maintained that the data were incomplete because AT&T had not provided statistical studies of demand and its assumptions regarding elasticity were not provided. In addition, the petitioners objected to AT&T's use of a diffusion rate commonly associated with the introduction of a new service to calculate the time it would take for Megacom to reach maturity. They argued that the rate used by AT&T encompassed too long of a time frame, since AT&T's target market for Megacom was comprised of sophisticated users who, according to the petitioners, would respond quickly to a new offering. *Id.* at 9 (para. 21).

13. This Commission found that the petitioners' arguments concerning AT&T's tariff support material did not present sufficient grounds for suspension or rejection of the tariff. However, we expressed concern that some petitioners devised estimates of projected demand and revenues for Megacom that differed markedly from AT&T's estimates. While we concluded that these discrepancies were not "sufficient justification for rejection or suspension," we found that the petitioners' concerns were serious enough to warrant investigation. Accordingly, this Commission instructed the Bureau to send information requests to AT&T to gather data on Megacom's first year of operation to determine if AT&T's revenue and demand projections matched the actual performance of the Megacom and Megacom 800 services. We also instituted an accounting order. *Id.* at 11 & n. 19.

14. The Bureau issued an information request on December 15, 1986 (Megacom Letter),[7] and AT&T responded on January 16, 1987 (1987 Megacom Report).[8] In its response, AT&T provided tables showing the forecasted and actual message, minute, and revenue results for Megacom for 1985 and 1986. 1987 Megacom Report at 2, Table 1; 7, Table 3. The data show that the actual demand and revenues fell far short of AT&T's predictions for both years. For example, AT&T estimated that revenues for 1986 would be $287.8 million; actual revenues for that year were $.37 million. *Id.* at 2, Table 1. For Megacom 800, demand and revenues also fell short of the forecast for 1986. AT&T had forecast revenues of $459.8 million while actural revenues for 1986 were $62.9 million. *Id.* at 7, Table 3.

15. In its 1987 Megacom Report, AT&T also provided a revised estimate of demand and revenues. This revision was necessary, according to AT&T, because its original

forecasts were based on the assumption that the tariff would be permitted to take effect as scheduled on September 13, 1985. However, the tariff did not become effective until November of that year and, because of the lead time required to establish access and other components of the service, Megacom was not provided until December 1985. *Id.* at 2-3. Moreover, AT&T asserted that a downward adjustment to the demand forecast for Megacom was warranted "because it was recognized that resellers of WATS would be unlikely to shift to AT&T Megacom Service as long as they remained exempt from the payment of access charges to local exchange carriers." *Id.* at 3. The 1987 Megacom Report showed that actual demand for Megacom exceeded AT&T's *revised* demand forecast by 67 million minutes of use out of a total of 407 million minutes of use. (AT&T had forecast 340.1 million minutes of use.) *Id.* at 5, Table 1a. For Megacom 800, demand was essentially in line with the revised forecast. AT&T predicted 369 million minutes of use for 1986 while actual demand was 341.5 million minutes of use for that year. *Id.* at 9, Table 3a.

16. The 1987 Megacom Report also showed the cross-elastic effects of Megacom on its WATS and private line services. For 1986, AT&T's forecasts were close to the actual figures. AT&T forecasted that 73.0 million minutes of WATS would be lost to Megacom (not Megacom 800). The actual number of minutes lost was 87.1 million. AT&T's forecasts for Megacom 800 for 1986 were not realized. AT&T forecasted that WATS would lose 1,013.7 billion minutes of use to Megacom 800 in 1986. In fact, only 132.8 million minutes of WATS were lost to Megacom 800 that year. *Id.* at 6, Table 2; 10, Table 4.

III. FEBRUARY 1988 FILINGS

17. On January 26, 1987, this Commission issued a Public Notice inviting comments on AT&T's response to the SDN Letter and Megacom Letter. A number of parties filed comments to which AT&T filed a response.[9] Based on the data received from AT&T, and on the comments, the Bureau sent AT&T two additional letters on September 30, 1987, to gather more data relating to SDN and Megacom, respectively.[10] In sending the letters, the Bureau explained that while this Commission had indicated in the *SDN Order* and the *Megacom Order* that one year of data would be sufficient to meaningfully evaluate SDN and Megacom, the Bureau had subsequently determined for several reasons that an additional year of information was required. First, the Bureau noted that AT&T indicated in both its 1987 SDN Report and its 1987 Megacom Report that delays in implementation and various changes in access charges made it difficult to compare directly the forecasted and actual data during the first year of operation for both services. Second, the Bureau determined that other changes, such as the subsequent implementation of a rate stability plan, might affect revenues and demand for SDN and Megacom.[11] Finally, the Bureau noted that in order to comply with this Commission's stated intent to exercise our Section 218 authority to monitor the bypass effects of SDN, it was necessary to obtain information on such effects from AT&T.

18. On February 29, 1988, AT&T responded to the Bureau's September 30, 1987, information requests with separate reports on SDN and Megacom (1988 SDN Report and 1988 Megacom Report).[12]

A. *1988 SDN Report*

19. In the 1988 SDN Report, AT&T claimed its customer base increased from 28 to 70 during calendar year 1987.[13] AT&T alleged that demand for the service was low because of the delay in availability of switched access to originate SDN Service calls and the delay in movement of traffic and locations to customers' SDN Service. 1988 SDN Report at 1-2.

20. As part of its 1988 SDN Report, AT&T submitted its forecasted and actual fourth quarter 1986 message, minute, and revenue results as well as those for calendar years 1986 and 1987. The actual 1987 demand for the service was below that originally forecasted by AT&T. *Id.* at 3, Table 1. AT&T explained that it lost many potential customers because neither switched access nor, the alternative, 10XXX access, was available. AT&T anticipated that when 10XXX switched access became available in 1988, more customers would utilize SDN. The 1988 Report also included information regarding the cross-elastic effects of SDN Service on WATS and private line services. 1988 SDN Report at 5-7. As in 1986, the cross-elastic effects of SDN Service on WATS and private line services were minimal in 1987. In particular, AT&T noted that only 53.6 million minutes of WATS use were lost to SDN Service in 1987. *Id.* at 6.[14]

21. In connection with the bypass monitoring established in the *SDN Order*, AT&T's 1988 SDN Report also furnished data regarding billed terminating switched access minutes for which it paid the LECs in connection with SDN Service during the fourth quarter of 1986 and calendar year 1987. *Id.* at 8, Table 3. AT&T reported that the data show that SDN continued to contribute to non-traffic sensitive cost recovery on a high proportion of its total traffic. *Id.* at 8. Finally, AT&T responded to the Bureau's request for a comparison of the average revenue and average cost per minute for the SDN Usage Rate Stability Plan vis a vis conventional SDN Service minutes. AT&T concluded that the revenues and costs were the same under both rate plans, although it did not provide specific figures. *Id.* at 9.

B. *1988 Megacom Report*

22. In the 1988 Megacom Report, AT&T stated that Megacom experienced substantial growth during 1987. It reports that Megacom's minutes of use increased by 340 percent and that Megacom 800's minutes of use increased by 460 percent. 1988 Megacom Report at 1-2. AT&T stated, for example, that in 1986, there were 404.7 million minutes of use for Megacom (not Megacom 800). This figure rose to 1,790.2 billion minutes in 1987. In response to the Bureau's data request regarding the cross-elastic effects of Megacom Service on WATS and private line services, AT&T reported that the loss in revenues from AT&T's WATS and private line services approximated the revenues generated from Megacom. The cross-elastic effects on revenues due to the introduction of Megacom Service was about $300 million. *Id.* at 3-6. Finally, AT&T compared the average revenue and average cost per minute for the Megacom Usage Rate Stability Plan with conventional Megacom Service minutes. As with SDN, AT&T reported that they were identical, but did not furnish specific figures. *Id.* at 7.

IV. DISCUSSION

23. Our concern about the rates for SDN Service, as expressed in the *SDN Order*, was whether SDN Service was "like" MTS and WATS. In this connection, we stated that the proposed rate structure should be based on a consistent treatment of "like" service components, or else the SDN rates could be unjustly and unreasonably discriminatory in violation of Section 202(a) of the Act. *SDN Order* at paras. 15-16. As for Megacom, this Commission was concerned with the accuracy of AT&T's demand forecasts, which formed, in part, its basis for setting the rates for Megacom Service. We decided to investigate Megacom because some parties filing petitions against the tariff had devised estimates of projected Megacom demand and revenue that differed from AT&T's. *Megacom Order* at paras. 26, 39.

24. After reviewing the information supplied by AT&T, we conclude, based on the record before us, that the SDN Service rates under investigation are not unreasonably discriminatory as compared with the rates for MTS and WATS, because they are not "like" services. In addition, we find that demand for Megacom Service has become more consistent with that forecast by AT&T. Accordingly, we are no longer concerned that the rates for Megacom were based on inaccurate cost support data.

A. *SDN*

25. To enforce Section 202(a), this Commission engages in a three-step analysis. As a first step, we must determine whether the services involved are "like." *MCI Telecommunications Corp. v. FCC*, 842 F.2d 1296, 1307 (D.C. Cir. 1988); *see also American Broadcasting Company v. FCC*, 663 F.2d 133, 138 (D.C. Cir. 1980). If they are, we must then determine (a) whether any discrimination exists, and (b) if so, whether that discrimination is just and reasonable. *MCI Telecommunications Corp. v. FCC, supra*, 842 F.2d at 1307. In this case, we need not address the second or third steps in this process, for we conclude that SDN and MTS/WATS are not "like" services.

26. This Commission has developed, and the D.C. Circuit has approved, the "functional equivalency" test for evaluating "likeness." Under this test, we focus on whether one service differs -- either as an objective technical matter, or in terms of customer perception -- in any material functional respect from another. *See Western Union International, Inc. v. F. C. C.*, 568 F.2d 1012, 1018 & n.11 (2d Cir. 1977), *cert. denied*, 436 U.S. 944 (1978); *American Trucking Association, Inc. v. F. C. C.*, 377 F. 2d 121, 127-28 (D.C. Cir. 1966), *cert. den.*, 386 U.S. 943 (1967); *American Telephone and Telegraph Co.* (WATS), 70 FCC 2d 593, *recon.*, 79 FCC 2d 10 (1980), *vacated and remanded sub nom. Ad Hoc Telecommunications Users Committee v. F. C. C., supra*, 680 F. 2d at 796-97. After comparing the technical and operational features of SDN and MTS/WATS, we find that the services differ in material respects. An important difference is that SDN traffic must be moved through a Class 4ESS switch, while MTS/WATS service can be offered through any switch. Thus, unlike MTS/WATS, SDN can be offered in a more limited number of areas. Another major difference between the services is the special software and other equipment used in connection with SDN to permit AT&T to create a "virtual" private line capability with private network features, such as on-network numbering plans, station-to-station dialing, authorization codes, call screening, flexible routing, and remote access, among others, within the public switched network.[15] These technical and operational features differentiate the services and thus render them "unlike" for purposes of analysis under Section 202(a).

27. We also conclude that SDN is not like MTS or WATS when viewed in terms of customer perceptions. *See Ad Hoc Telecommunications Users Committee v. F. C. C., supra*, 680 F.2d at 796-97. Those potential customers of SDN Service that commented in earlier rounds of this proceeding perceived SDN as different from MTS and WATS. The American Petroleum Institute (API) observed that SDN "represents a new and innovative service that is attractive to telecommunications users."[16] API stressed that because SDN permits customers to obtain a "'packaged' network in lieu of piecing together a number of service offerings . . . [it] affords users the ability to manage communications costs more efficiently and provides a comprehensive plan for integrating all elements and locations of a business into a single network . . . ."[17] For example, API noted that SDN provides users with the ability to integrate voice, electronic mail, and teleprocessing services without resorting to different, parallel networks.[18] API also asserted that SDN permits users to interface with other customer networks in a manageable manner. In API's view, "[a]side from the virtual networks being proposed by several [other] carriers, no other communications service offering affords these unique features."[19] Similarly, the Ad Hoc Telecommunications Users Committee (Ad Hoc) stated "it is clear that SDN is not 'like' MTS or WATS . . ., [but rather] is a distinctly different service meeting distinctly different needs for distinctly different sets of customers."[20]

28. While we did not find these statements of subjective customer perception sufficient, by themselves, to resolve the "like services" issue definitively when we undertook this investigation in the *SDN Order*, we now conclude that they do provide probative evidence that SDN is not like MTS or WATS, particularly when viewed in conjunction with the technical and operational differences discussed above.[21] We therefore find that AT&T's rates for SDN Service are not unjustly discriminatory[22] and that there is no basis upon which to take remedial action for past SDN charges, or to order prospective relief.[23]

B. *Megacom*

29. This Commission decided to investigate AT&T's demand and revenue projections for Megacom because a number of parties questioned their accuracy in the initial tariff filing. Their concerns, however, did not supply "sufficient justification for rejection or suspension." *Megacom Order* at para. 26. Several petitioners argued that AT&T's demand projections were too low. By implication, such underforecasting would result in rates that were then too high.[24] However, the data submitted by AT&T clearly show that AT&T's forecasts were, if anything, too optimistic during the period from 1985 to 1987. Thus, the petitioners' concerns have not been borne out.

30. Moreover, on a prospective basis, our investigation indicates that demand for Megacom is coming into line with projections. Demand has been steadily increasing. For example, AT&T had estimated that there would be 515.46 million messages in 1986. While actual messages for that year did not reach this level, by the next year messages increased to 477.7 million. Likewise, while revenues did not reach the levels projected by AT&T, nonetheless they did increase significantly. Revenues rose from

$67.5 million in 1986 to $276.4 million by the following year. 1988 Megacom Report at 3, Table 1. In addition, subsequent rate structure changes to Megacom Service[25] should continue this trend of increasing demand, which should act to align revenues from the service with costs. Under the circumstances, we are satisfied that AT&T's rates for Megacom and Megacom 800 are lawful, and we therefore terminate our investigation of these services. In addition, we terminate the pending accounting order initiated in the *Megacom Order*.

V. ORDERING CLAUSES

31. Accordingly IT IS ORDERED that the investigation and accounting order initiated in AT&T Communications, Tariff F.C.C. Nos. 1, 9, and 10, Transmittal No. 321, CC Docket No. 85-203, ARE TERMINATED.

32. IT IS FURTHER ORDERED that the investigation and accounting order initiated in AT&T Communications, Tariff F.C.C. Nos. 1, 2, 9, and 10, Transmittal Nos. 434 and 435, CC Docket No. 85-326, ARE TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] AT&T Communications, Revisions to Tariff F.C.C. Nos. 1, 9, and 10, Northwestern Bell Telephone Co., Revisions to Tariff F.C.C. No. 52, CC Docket No. 85-203, Mimeo No. 5282, released June 20, 1985 (*Investigation Order);* AT&T Communications, Docket No. 85-203, Memorandum Opinion and Order, 103 FCC 2d 157 (1985) (*SDN Order);* AT&T Communications, Revisions to Tariff F.C.C. Nos. 1, 2, 9, and 10, CC Docket No. 85-326, FCC 85-584, released Nov. 7, 1985 (*Megacom Order*). The *Investigation Order* and the *SDN Order* initiated and further defined the SDN investigation, while the *Megacom Order* initiated the Megacom investigation.

[2] The suspended tariff became effective on November 4, 1985.

[3] Letter from Chief, Common Carrier Bureau, to R.H. Rokos, Administrator, Rates and Tariffs, AT&T Communications, Dec. 15, 1986.

[4] *See* Ad Hoc Telecommunications Users Committee v. FCC, 680 F.2d 790, 796 n.13 (D.C. Cir. 1982)("Examination of cross-elasticity of demand may be a standard means" for evaluating whether services are "like" in connection with unlawful discrimination issues under Section 202(a) of the Communications Act.). AT&T had already furnished *estimates* of demand, revenue, cross-elastic effects of providing SDN Service on other AT&T services, and certain cost information in its Description and Justification (D&J) accompanying the SDN Service tariff filing. The *SDN Letter* ordered AT&T to furnish the *actual* data based on the first year of operation of SDN Service.

[5] Letter from W.E. Lind, Administrator, Rates and Tariffs, AT&T Communications to Secretary, FCC, Jan. 16, 1987.

[6] This figure compares with the approximately 26 billion interstate conversation minutes of basic inward and outward WATS usage in 1986. *See* Docket 87-611, AT&T Direct Case, Att. 3 - Demand Data Schedules, filed Jan. 28, 1988. In AT&T's view, the migration in usage from WATS and private line services to SDN Service that did occur resulted from the fact that SDN rates were lower. 1987 SDN Report at 8.

[7] Letter from Chief, Common Carrier Bureau, to R.H. Rokos, Administrator, Rates and Tariffs, AT&T, Dec. 15, 1986.

[8] Letter from W.E. Lind, Administrator, Rates and Tariffs, AT&T Communications to Secretary, FCC, Jan. 16, 1987.

[9] Southwestern Bell Telephone Company, New York Telephone Company and New England Telephone and Telegraph Company, and the Ad Hoc Telecommunications Users Committee filed comments on February 20, 1987. For the most part, the commenters request that we require that AT&T's data be disaggregated geographically, that the data be more detailed and reported more frequently, and that the reports show all of AT&T's services for comparison purposes. AT&T responded on March 9, 1987. It states that the additional data requested by the commenters are not relevant to the purposes of these proceedings. In addition, AT&T states that the data requested are proprietary and disclosure would give AT&T's competitors an unfair advantage.

[10] Letters from Chief, Common Carrier Bureau, to W.E. Lind, Administrator, Rates and Tariffs, AT&T Communications, Sept. 30, 1987.

[11] The rate stability plan allowed customers to "lock in" a rate if they agreed to take service for a specific length of time.

[12] Letters from W.E. Lind, Administrator, Rates and Tariffs, AT&T Communications, to Acting Secretary, FCC, Feb. 29, 1988.

[13] The base of 70 customers reflected customers who had ordered the service. There were 47 customers receiving service in 1987.

[14] This figure compares with the approximately 23.6 billion interstate conversation minutes of basic inward and outward WATS usage that year. *See* Docket 87-6111, AT&T Direct Case, Att. 3 - Demand Data Schedules, filed Jan. 28, 1988.

[15] *See* AT&T Tariff FCC No. 1, Section 6.4.1. The flexible routing and remote access features were added subsequent to the original offering.

[16] API Comments, filed Aug. 6, 1985, at 3.

[17] *Id.*

[18] *Id.* at 4.

[19] *Id.* at 3.

[20] Ad Hoc Comments, filed Aug. 6, 1985, at 11.

[21] The cross-elasticity data we received from AT&T in response to the *SDN Order* and the Bureau's subsequent information requests are not inconsistent with our conclusion that SDN is not "like" MTS or WATS. In its 1988 SDN Report, AT&T reported that 53.6 million minutes of WATS usage were diverted to SDN in 1987, representing approximately $13 million in revenues. 1988 SDN Report at 6, Table 2. This amount of traffic diversion represents but a small fraction of one percent of AT&T's 23.6 billion minutes of overall WATS traffic that year. *See* note 14, *supra*. Moreover, it appears that more SDN traffic was derived from private line services -- both as an absolute matter and as a percentage of the contributing service -- than from MTS/WATS, demonstrating that SDN usage was less cross-elastic with MTS/WATS than with private line services. *See* 1988 SDN Report at 6 Table 2 (reporting a loss of $30.4 million in private line revenues to SDN in 1987); AT&T FDC Report, filed June 1988 (reporting $4.1 billion in total interstate private line revenues for AT&T in 1987).

[22] In addition, even if we were to find SDN and MTS/WATS to be "like" services, we note that AT&T uses a more efficient, lower cost, billing system for SDN because of the low number of high volume SDN users. This cost saving translates into a lower rate structure for SDN. *See Investigation Order* at para. 17.

[23] AT&T has filed revisions to its SDN tariffs which lowered rates for that service and made significant changes to its rate schedule, including the reduction of the initial period from 30 to 18 seconds, and the introduction of a "basic option" having fewer service features. *See, e. g.*, Transmittal 1194, filed April 29, 1988; Transmittal 1295, filed July 29, 1988; Transmittal 1519, filed February 15, 1989; Transmittal 1605, filed May 15, 1989. These changes, which AT&T asserts are designed to meet increasing competition, should stimulate demand and revenues for SDN, thereby addressing earlier shortfalls from projected demand and revenue levels.

[24] This concern with demand also appears to have been tied to fears regarding bypass. However, the Commission concluded that the bypass issue did not warrant investigation. *Megacom Order* at paras. 14-18.

[25] For example, Transmittal 1295, filed July 29, 1988, changed the initial period for Megacom from 30 to 18 seconds, to bring Megacom rates in line with concurrently proposed SDN rate changes.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 86-43

In the Matter of

NEW JERSEY BELL TELEPHONE COMPANY
Tariff F.C.C. No. 38 Transmittal No. 474

Proposed Revisions To Establish
Rates and Regulations for Local
Packet Switching Service

MEMORANDUM OPINION AND ORDER ON RECONSIDERATION

Adopted: December 20, 1989; Released: January 17, 1990

By the Commission:

I. INTRODUCTION

1. On August 7, 1989, GTE Telenet Communications Corporation (Telenet) and Tymnet, Inc. (Tymnet) jointly filed a petition for reconsideration of an Order released by this Commission in the above-captioned proceeding.[1] The Order terminated an investigation of the New Jersey Bell Telephone Company's (New Jersey Bell) rates for its Local Packet Switching Service (LPSS). The Bell Atlantic Companies (Bell Atlantic), on behalf of New Jersey Bell, filed an opposition to Telenet and Tymnet's petition on September 6, 1989.[2] Telenet and Tymnet filed a reply to Bell Atlantic's opposition on September 15, 1989.

II. BACKGROUND

2. In 1985, New Jersey Bell filed Transmittal 474 to market packet switching services. New Jersey Bell filed the tariff revisions pursuant to a Commission Order providing that certain common carriers could offer protocol conversion services without the need to form separate subsidiaries. [3] Telenet and Tymnet, who both offer protocol conversion and packet switching services to the public, filed petitions to reject or suspend the tariff revisions which asserted that the New Jersey Bell rates were too low. Subsequently, the Common Carrier Bureau initiated an investigation to examine issues relating to the cost support provided with the revisions, and required New Jersey Bell to file quarterly reports identifying the costs and revenues associated with its LPSS service.[4] In April 1986, Bell Atlantic, on behalf of New Jersey Bell, filed Transmittal 52, which increased the rates for LPSS.[5] Telenet and Tymnet again filed petitions against the proposed rates, arguing that the rates were still too low. The Common Carrier Bureau accepted the rate revisions subject to the outcome of the investigation in this docket.[6] Finally, Bell Atlantic filed Transmittal 239 in April 1988 on behalf of New Jersey Bell. The effect of this transmittal was to revise the rates and data submitted originally with New Jersey Bell's Transmittal 474. No parties opposed Transmittal 239 and it became effective on July 16, 1988.

3. In our *Final Order*, we concluded that the tariff revisions in Transmittals 52 and 239 filed subsequent to Transmittal 474 changed the circumstances which prompted this investigation such that any further attempt to resolve the issues raised by those transmittals was unnecessary. The issue under investigation was whether Bell Atlantic's rates in Transmittals 474 and 52 were too low. Because Transmittal 239, which was not opposed by either Telenet or Tymnet, resulted in New Jersey Bell LPSS rates above those originally filed under Transmittal 474, this Commission concluded that it was no longer necessary to devote Commission resources to this investigation. The Commission concluded that even if the rates under investigation had been unreasonably low during the period that the rates were in effect, the only possible remedy would have been a rate increase. Accordingly, the Commission terminated the investigation.[7]

III. SUMMARY OF PLEADINGS

4. Telenet and Tymnet aver that the *Final Order* is incorrect in asserting that Transmittal 239 increased the rates for LPSS. Petitioners also claim that the Order is illogical in concluding that because they did not protest Transmittal 239, they did not believe that the rates contained therein were not predatory. Telenet and Tymnet Petition at 4. Petitioners concede that Transmittal 239 increased LPSS rate elements, but assert that usage-based rates for LPSS actually declined. *Id.* at 5. Telenet and Tymnet explain that they did not protest Transmittal 239 because they did not view the transmittal as affecting the issues in this investigation. *Id.* at 5-7. Furthermore, petitioners argue that the *Final Order* is defective because this Commission failed to account for the low demand in Transmittal 239 (as opposed to the demand forecasted in Transmittal 474), and failed to account for the fact that the proposed revenues in Transmittal 239 fall short of the forecasted revenues in Transmittal 474. *Id.* at 7-9. Finally, Telenet and Tymnet conclude that there is still an available remedy in this investigation -- the Commission may still require Bell Atlantic to raise its LPSS rates.

5. Bell Atlantic replies that in arguing that Transmittal 239 actually decreased rates, petitioners are incorrectly comparing the rates in Transmittal 239 with the LPSS rates effective at the time that transmittal was filed. Bell Atlantic Opposition at 2-3. Bell Atlantic argues that this Commission compared the Transmittal 239 LPSS rates with the rates under investigation, which were the rates in Transmittal 474. *Id.* In addition, Bell Atlantic asserts that this Commission was correct in concluding that Telenet and Tymnet's failure to protest Transmittal 239 could be interpreted as acquiescence to the rates proposed therein. *Id.* at 4-5. Bell Atlantic says that this point is irrelevant, however, because this Commission has the discretion to terminate an investigation without any obligation to consider petitioners' actions. Moreover, Bell Atlantic notes, we are obligated to terminate this investigation under the recent legislation imposing certain deadlines on Commission proceedings.[8] *Id.* at 5. Furthermore, Bell Atlantic argues that this Commission should not hold Bell Atlantic to its original forecasts for LPSS because the service had never been offered by any other carrier and, hence, there

was no basis for an accurate forecast. *Id.* at 6. Finally, Bell Atlantic supports our conclusion in the *Final Order* that the investigation at issue could be terminated because there is no possibility of relief. *Id.* at 7.

6. In their reply to Bell Atlantic's opposition, petitioners raise two arguments concerning Bell Atlantic's assertion that this Commission was comparing the rates in Transmittal 239 with the rates in Transmittal 474. First, Telenet and Tymnet argue that such comparison would be irrelevant because the rates in Transmittal 474 were superseded by the rates in Transmittal 52.[9] Telenet and Tymnet Reply at 4-7. Second, petitioners argue that if this Commission was indeed comparing the LPSS rates in Transmittal 239 with those rates in Transmittal 474, we would not have inferred from petitioners' failure to protest Transmittal 239 that the petitioners did not believe the new rates to be predatory. *Id.* Telenet and Tymnet further assert that this Commission does not have the discretion to terminate an investigation without judicial review. *Id.* at 7-8. Moreover, they argue, this Commission is not obligated to terminate the investigation under the Authorization Act; rather, we are only obligated to decide whether to grant the petition for reconsideration. *Id.* at 9-10. Finally, petitioners aver that Bell Atlantic is incorrect in arguing that no relief is available in this investigation. *Id.* at 11-13.

IV. DISCUSSION

7. We find it unnecessary to decide the merits of petitioners' claims with respect to the mootness rationale that the *Final Order* used to explain the decision to terminate this investigation. As discussed below, we conclude, albeit on different grounds, that this investigation should be terminated, and accordingly deny Telenet's and Tymnet's petition.

8. The *Designation Order* said that New Jersey Bell's LPSS rates would be investigated because of uncertainty regarding New Jersey Bell's cost support, particularly its demand and revenue forecasts. The *Designation Order* required the carrier to file reports on its LPSS revenues to ensure that LPSS rates recovered their costs. We find that the record in this proceeding, including New Jersey Bell's LPSS reports, demonstrates that anticompetitive or otherwise improper pricing is unlikely to occur, and that no useful purpose would be served by continuing this investigation.

9. We find that this Commission's determinations in two recent decisions involving the packet switching services of Southern Bell Telephone and Telegraph Company (Southern Bell) are applicable in assessing the utility of continuing to investigate New Jersey Bell's LPSS rates. The first Order, in which the Commission granted Southern Bell a waiver of the cost support requirements of Section 61.38 of our Rules, 47 C.F.R. § 61.38, states that:

> Section 61.38 of our Rules normally requires that carriers proposing to offer a new service submit a study projecting costs for a representative 12-month period as well as estimates of the effect of the proposed tariff revisions on the carrier's traffic and revenues . . . . Because we find that existing market conditions make it unlikely that BellSouth could engage in anti-competitive or otherwise improper pricing, we conclude that it is reasonable to waive the requirement that BellSouth submit detailed cost and demand projections for [its public packet switching service] at this time.[10]

Based upon the foregoing analysis, we subsequently terminated our investigation of the rates for Southern Bell's public packet switching service. We determined, based upon cost and revenue reports filed by that carrier, that the Southern Bell packet switching offerings had a very limited impact on the market, and that our authority under Section 204 and 208 of the Communications Act, 47 U.S.C. §§ 204, 208, would be sufficient to deter potential threats to competition or ratepayers in the future.[11]

10. The record in this proceeding reveals conditions that are very similar to the conditions that led this Commission to waive cost support requirements and to terminate the investigation in connection with Southern Bell's packet switching service. New Jersey Bell's quarterly reports demonstrate that its packet switching service has, in fact, had limited impact on the market.[12] We recognize, as we did in connection with the Southern Bell investigation, that market conditions are seldom static. We believe, however, that the complaint procedures under Section 208 of the Communications Act, 47 U.S.C. § 208, provide a viable check, under present circumstances, against anticompetitive or otherwise improper behavior. In addition, we may initiate investigations of local exchange carrier packet switching services in the future, should circumstances warrant such action. In light of these conclusions, our administrative resources are best employed, consistent with the Communications Act, by affirming our decision in the *Final Order* to terminate this investigation.

V. ORDERING CLAUSE

11. Accordingly, IT IS ORDERED that the petition for reconsideration filed by GTE Telenet Communications Corporation and Tymnet, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] New Jersey Bell Telephone Company, Transmittal No. 474, Proposed Revisions To Establish Rates and Regulations for Local Packet Switching Service, CC Docket No. 86-43, Memorandum Opinion and Order, 4 FCC Rcd 5360 (1989) (*Final Order*).

[2] Bell Atlantic filed a motion for extension of time to file its opposition on August 15, 1989, and the Bureau granted it on August 21, 1989. *See* New Jersey Bell Telephone Company, Transmittal No. 474, CC Docket No. 86-43, DA 89-994, released Aug. 21, 1989 (Com.Car.Bur.).

[3] *See* Petitions for Waiver of Section 64.702 of the Commission's Rules and Regulations, 100 FCC 2d 1057 (1985) (*Protocol Waiver Order*).

[4] New Jersey Bell Telephone Company, Revisions to Tariff F.C.C. No. 38 To Establish Rates and Regulations for Local Packet Switching Service, CC Docket No. 86-43, Mimeo No. 2381, released Feb. 4, 1986 (*Designation Order*).

[5] *See* Bell Atlantic Tariff F.C.C. No. 1, Transmittal No. 52, filed Apr. 7, 1986.

[6] New Jersey Bell Telephone Company and Bell Atlantic Telephone Companies, Revisions to Tariff F.C.C. No. 1 To Establish Rates and Regulations for Local Packet Switching Service, Transmittal Nos. 52 and 53, Mimeo No. 5305, released June 23, 1986 (Com.Car.Bur.).

[7] *Final Order*, 4 FCC Rcd at 5361.

[8] *See* Federal Communications Commission Authorization Act of 1988, Pub. L. No. 100-594, § 8, 102 Stat. 3021, 3032 (1988) (Authorization Act).

[9] *See* para. 2, n.5, *supra*.

[10] BellSouth Corporation on Behalf of Southern Bell Telephone and Telegraph Company, Petition for Waiver of Section 64.702 of the Commission's Rules and Regulations To Authorize Protocol Conversion Offerings, FCC 88-333, 3 FCC Rcd 6961, 6962 (1988) (*BellSouth Order*).

[11] Southern Bell Telephone and Telegraph Company, Revisions to Tariff F.C.C. No. 1 To Introduce Rates for X.25 and X.75 Protocol Packet Switching Network Channel Interfaces, Transmittal Nos. 1310 and 1320, FCC 89-314, released Dec. 8, 1989.

[12] New Jersey Bell's quarterly total company regulated revenues from packet switching services have ranged from $26,587 during the second quarter 1987 to $74,662 during the third quarter 1988.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

An Indefinite Extension of the Part 15 Interim Provisions for Cordless Telephones — RM-5320

MEMORANDUM OPINION AND ORDER

Adopted: December 20, 1989; Released: January 17, 1990

By the Commission:

INTRODUCTION

1. By this action, we grant the Electronic Industries Association's (EIA) petition for partial reconsideration of an *Order* in this proceeding.[1] The *Order* allows indefinite extension of Part 15 interim provisions for cordless telephones and modifies parts of Sections 15.231 - 15.233 of the Rules.[2]

BACKGROUND

2. On December 22, 1983, the Commission adopted Part 15 interim provisions for cordless telephones in response to petitions filed by the EIA and Mura Corporation. [3] Operation was permitted on ten duplex channels in spectrum that is allocated for federal government use near 46 and 49 MHz. Interim provisions required the manufacture and importation of cordless telephones to cease February 15, 1989, and marketing to terminate on February 15, 1990.

3. Subsequently, the EIA submitted a petition (RM-4780) requesting an allocation of four megahertz of spectrum in the 800/900 MHz land mobile reserve.[4] Since no action was immediately taken on this petition, on January 6, 1988, EIA submitted another petition requesting a five year extension of the Part 15 interim provision termination dates. In anticipation of a possible move in frequency, EIA claimed this extension would provide the time necessary to redesign and manufacture equipment, and would avoid any interruption in the manufacture of 46/49 MHz telephones.

4. In November 1987, the Commission issued separate Orders denying EIA's petition for an allocation in the 800/900 MHz band (RM-4780) and amending applicable Part 15 Rules to permit cordless telephones to continue to be manufactured, imported and marketed at 46/49 MHz indefinitely (RM-5320). Additionally, the *Order* in RM-5320 made minor modifications to Part 15 technical rules to give manufacturers the option to divide or split the existing ten channels. The previous rules limited cordless telephone transmission to a twenty-kilohertz bandwidth, centered on specific frequencies or channels. This in essence defines an emission envelope. The revised rules removed the restriction on center frequency, with the proviso that emissions must remain within the same twenty-kilohertz envelope. This would make it possible, through off-frequency operation using bandwidths of ten kilohertz or less, to create two or more channels in the same spectrum currently used by one channel. Sections 15.232 and 15.233 were amended to provide this flexibility. The Commission noted the amendments were not expected to affect potential interference to existing radio services. Further the Commission noted that the rule changes were noncontroversial. Therefore, notice and comment procedures were deemed unnecessary.

DISCUSSION AND DECISION

5. In January 1987, EIA filed a petition for partial reconsideration in response to the *Order* in RM-5320. EIA objected to the portion of the *Order* that permits the use of offset channels because it is concerned that increased interference between cordless telephone users may occur. EIA indicated that the introduction of rules permitting the use of flexible channel assignments without adequate time for consideration and comment is not in the public interest. Thus, EIA requests that the amendments concerning channel assignments be rescinded until it can be demonstrated that use of off-set channels would benefit the public.

6. While we continue to believe that the use of off-set channels will not lead to increased interference between cordless telephones, we accept EIA's argument that substantive issues may be involved in relaxing the channeling requirements for cordless telephones. Accordingly, we are staying the technical modifications of Part 15.[5] Further, we are issuing a companion Notice inviting comment on our proposal to permit the use of off-set channels.[6]

ADMINISTRATIVE

7. Authority for this action is contained in Sections 4(i),302 and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 302, 303(r), and Section 553 of the Administrative Procedure Act, 5 U.S.C. Section 553.

8. Accordingly, IT IS ORDERED that the requirement allowing cordless telephone operation on frequencies offset from the frequency pairs specified in Part 15, Section 15.233 IS STAYED.

9. IT IS FURTHER ORDERED that this proceeding, RM-5320, IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy,
Secretary

FOOTNOTES

[1] *See Order* RM-5320, 2 FCC Rcd 7276 (1987).

[2] *See* 47 C.F.R. 15.231 et. seq. (1987).

[3] *See Report and Order*, GEN Docket No. 83-325, 49 FR 1512, (January 12, 1984), 55 RR 2d 279 (1984).

[4] *See* Order, RM-4780, 2 FCC Rcd 7278 (1987).

[5] *See* 47 C.F.R. 15.231 et. seq. (1988). *See also First Report and Order*, GEN Docket No. 87-389, 4 FCC Rcd 3493 (1989) and *Erratum*, GEN Docket No. 87-389, _____ FCC Rcd _____ (1989).

[6] *See Notice of Proposed Rule Making*, GEN Docket No. 89-___.

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN. Docket No. 89-626

In the Matter of

Amendment of Part 15 of the
Commission's Rules to Permit
Cordless Telephone Operation
on Off-set Frequencies

NOTICE OF PROPOSED RULE MAKING

Adopted: December 20, 1989; Released: January 17, 1990

By the Commission:

INTRODUCTION

1. By this action, we propose to allow cordless telephones to operate on frequencies removed, or off-set, from the frequencies currently specified in our Rules. This would enable manufacturers to subdivide the channels provided for cordless telephone operation. Subdivision of the existing channels would increase the number of channels available for cordless telephones, permitting more telephone conversations to be carried in the same amount of spectrum.

BACKGROUND

2. Part 15 of the Rules provides for the operation of cordless telephones on one of ten duplex channels at frequencies near 46 and 49 MHz. As originally adopted, the rules required that radio signals transmitted by cordless telephones must fall on authorized channel frequencies and must be contained within a twenty kilohertz bandwidth.[1] The 46/49 MHz frequencies are allocated for use by the federal government. In view of this allocation, the Commission initially intended that its authorization of cordless telephones on these frequencies was to be an interim measure while it considered alternative frequencies for a permanent authorization.[2] Thus, manufacturing of such cordless telephones was to cease in February 1989 and importation and marketing was to cease in February 1990.

3. The Electronic Industries Association (EIA) subsequently submitted a petition (RM-4780) requesting an allocation for cordless telephones in the 800/900 MHz region of the spectrum. The EIA stated that the allocation should provide for forty channels of operation. The EIA indicated that forty channels were required to accommodate the anticipated growing market for cordless telephones and to avoid mutual interference between neighboring cordless telephones in urban environments.

4. In November 1987, the Commission issued separate Orders denying the EIA's petition for an allocation in the 800/900 MHz band and amending the Part 15 rules to permit cordless telephones to continue to be manufactured, imported and marketed at 46/49 MHz indefinitely. In the *Order* denying the EIA's petition for an allocation, the Commission stated that an allocation for these devices was inappropriate because they operate at relatively low power levels and can share frequencies with allocated services on a non-interference basis. [3] Further, the Commission noted that the EIA's arguments for additional channels were based on questionable assumptions. The Commission stated that any additional channels, if needed, can be obtained through more efficient use of the existing ten channels.

5. In the *Order* extending the 46/49 MHz provisions for cordless telephones, the Commission also modified the Part 15 Rules to allow manufacturers to subdivide the existing ten channels.[4] Specifically, the Commission deleted the requirement to operate at the center of the authorized channels, provided emissions still remain within the specified twenty-kilohertz bandwidth. This would permit, for example, two ten-kilohertz channels to be created from each of the current twenty-kilohertz channels, with the center frequency of each located five kilohertz above and below the currently specified frequencies. The Commission noted that this rule relaxation merely made available an additional option to cordless telephone manufacturers and it did not appear that there would be any increased risk of interference to other users of the spectrum. Accordingly, the Commission implemented this change without notice and comment.

6. Subsequently, the EIA filed a petition for partial reconsideration of the *Order* amending Part 15 to permit cordless telephone operation on off-set frequencies. The EIA is concerned that increased interference between cordless telephone users may occur. The EIA therefore requests that this change in the rules be considered through rule making proceeding. We are granting the EIA's petition for reconsideration in a *Memorandum Opinion and Order* to the extent that we are initiating herein a rule making to consider this matter.[5] The *Memorandum Opinion and Order* also stays the rule change that permits the use of off-set frequencies.

DISCUSSION

7. We to believe that permitting the operation of cordless telephones on off-set frequencies is in the public interest. Allowing manufacturers greater freedom in design could stimulate innovations that may lead to more efficient use of the frequencies available for cordless telephones. Further, such action is consistent with the policies we articulated in our recent comprehensive revision of the Part 15 Rules. Accordingly, we are proposing to allow operation of cordless telephones on off-set frequencies.

8. In its petition for reconsideration, the EIA indicates that cordless telephones exercising the option to use reduced bandwidths on off-set frequencies may suffer from increased interference. According to the EIA, increased interference could cause degraded audio quality and possibly affect control tones, causing existing cordless telephones to misdial calls or to go off-hook inadvertently. The EIA notes that most cordless telephones currently use frequency modulation (FM) with a channel bandwidth up to twenty kilohertz. The EIA states that an FM signal using a narrower bandwidth will require a higher signal-to-interference ratio due to a reduction in the capture

effect. The EIA contends that this increased interference would necessitate a greater separation in distance between cordless telephones in order to re-use frequencies successfully. Therefore, the EIA concludes that while the number of channels would increase, it is not clear that spectrum efficiency would be increased. Similarly, the EIA speculates that if manufacturers were to opt to employ other types of modulation, such as amplitude modulation or single sideband, the interference rejection characteristics could compare unfavorably with existing FM units. The EIA is concerned that the poorer quality of these units would reflect detrimentally on the industry as a whole.

9. We do not believe that a cordless telephone implementing off-set channels will adversely impact other cordless telephones or any authorized radio service in the 46/49 MHz region of the spectrum. Part 15 of our Rules prohibits cordless telephones from interfering with an authorized radio service. Part 15 also offers no interference protection between cordless telephones. Nevertheless, we would expect that the use of off-set channels would reduce the risk of interference to users of existing cordless telephones. For instance, we expect that the liklihood of neighbors operating cordless telephones on the same frequency would be reduced with the use of off-set frequencies; thus, interference would be reduced. Furthermore, in an attempt to reduce the risk of malfunctions due to interference between cordless telephones, we recently adopted a proposal to require the use of digital coding for control purposes.[6]

10. In our recent comprehensive revision of the Part 15 Rules for general low power transmitters, we provided considerable flexibility to manufacturers in the design of their products.[7] We pointed out that unnecessary regulations impede the introduction of innovative products. In fact, in addressing the regulations for general purpose transmitters on five frequencies in the 49 MHz band, we deleted the restrictions that limited operation to specific frequencies.[8] Instead, we defined an overall band of operation and allowed manufacturers to channelize or otherwise use the band as they determine is best. We believe the public interest would be served by following a similar course of action here.[9] We would anticipate that any cordless telephone that does not satisfy consumers would not compete very long in the market place. Thus, we believe that manufacturers should be permitted to decide whether telephones operating on off-set frequencies provide acceptable service or whether the trade-off in quality, if any, would be offset by the benefits of additional channels.

11. The EIA also expressed concern that some existing telephones may not comply with the bandwidth specification adopted in the *Order*. This was because the emission bandwidth had been specified relative to the actual carrier frequency, but in the revision was specified relative to the center frequencies listed in the rules. In our current proposal we have taken this concern into account. Specifically, we will account for carrier frequency drift by allowing the bandwidth specification to drift by an amount equal to the measured frequency tolerance. Thus, telephones that currently comply with the original bandwidth specification would continue to comply with the proposed specification.

12. We also have received an inquiry from ASCII of America proposing a cordless telephone system that would hop from one frequency to the next in the course of a normal conversation.[10] The current rules do not contemplate this type of operation. Comment is invited on whether a cordless telephone that hops among the cordless telephone frequencies should be permitted. Absent a showing why such a system poses an increased risk of interference, we will permit systems similar to ASCII's under the proposed rules.

13. We note that Part 15 has been reorganized and several other modifications were made to the cordless telephone rules since the *Order* permitting cordless telephones to operate on off-set frequencies was adopted. Also, we recognize that at least some revision to the existing rules is appropriate as discussed in paragraph 12, above. Accordingly, the text of the pertinent proposed rules is shown below.

PROPOSED RULES

14. In view of the discussion, Part 15 of the Commission's Rules is proposed to be amended as follows:

PART 15 - RADIO FREQUENCY DEVICES

1. The authority citation in Part 15 continues to read:

AUTHORITY: Sec. 4, 302, 303 and 307 of the Communications Act of 1934, as amended, 47 U.S.C. 154, 302, 303, and 307, unless otherwise noted.

2. Section 15.233 is proposed to be amended by revising paragraphs (b) and (d) to read as follows:

Section 15.233 Operation within the bands 46.60 - 46.98 MHz and 49.66 - 50.0 MHz.

* * * * *

(b) An intentional radiator used as part of a cordless telephone system shall operate within 10 kHz (neglecting frequency tolerance) of one or more of the following frequency pairs. Operation in which more than one frequency pair is used shall be permitted provided simultaneous transmissions on more than one pair does not occur.

* * * * *

(d) The fundamental emission and modulation products shall be confined to a 20 kHz band. Modulation products outside of a 20 kHz band shall be attenuated at least 26 db below the unmodulated carrier. Harmonics and other emissions outside of a 40 kHz band shall comply with the general field strength limits in Section 15.209. The 20 kHz band and the 40 kHz band shall be centered on the frequency listed in paragraph (b) that is nearest to the carrier frequency plus or minus the frequency tolerance at the temperature and voltage used during emission testing. Tests to determine compliance with these requirements shall be performed using an appropriate input signal as prescribed in Section 2.989.

* * * * *

ADMINISTRATIVE

15. For purposes of this non-restricted notice and comment rule making proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period. *See generally* Section 1.1206(a). The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. Section 1.1202(f). During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by Commission or staff for the clarification or adduction of evidence or the resolution of issues in the proceeding. Section 1.1203.

16. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding, or (2), if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. Section 1.102(b). Any person who submits a written *ex parte* presentation must provide on the same day it is submitted a copy of same to the Commission's secretary for inclusion in the public record. Any person who makes an oral *ex parte* presentation that presents data or arguments not already reflected in that person's previously filed written comments, memoranda, or filings in the proceeding must provide on the day of the oral presentation a written memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. Section 1.1206.

17. We have determined that the Regulatory Flexibility Act of 1980, 5 U.S.C. Section 605, does not apply to this rule making because if promulgated, it will not have a significant economic impact on a substantial number of small entities. While this proposal may provide marketing opportunities for radio manufacturers, some of which may be small business, we do not believe there would be any significant effects. We invite specific comments on this point by interested parties. A copy of this action will be sent to the Chief Counsel for Advocacy of the Small Business Administration.

18. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980, and found to contain no new or modified form, information collection and/or record keeping, labeling, disclosure, or record retention requirements; and will not increase or decrease burden hours imposed on the public.

19. This action is taken pursuant to the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 303(c), 303(f), 303(g), and 303(r). Interested parties may file comments on this proposal. Comments must be filed in accordance with our Rules, 47 C.F.R. Sections 1.415 and 1.419. In reaching our decision, the Commission may take into consideration information and ideas not contained in the comments, provided that such information is placed in the public file, and provided that the Commission's reliance on such information is noted in our final decision. All documents will be available for public inspection during regular business hours in the Commission's Public Reference Room at its headquarters in Washington, D.C. All comments and reply comments will be considered provided they are submitted in accordance with our Rules and provided they are submitted on or before **March 5, 1990,** and **March 20, 1990,** respectively.

20. For further information concerning this rule making contact Mr. Joseph Husnay at (202) 653-8114, Office of Engineering and Technology, Federal Communications Commission, Washington, D.C. 20554.

21. IT IS ORDERED that the secretary serve a copy of this Notice to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy,
Secretary

FOOTNOTES

[1] *See* 47 CFR Section 15.233 (1989), Operation within the bands 46.60 - 46.98 MHz and 49.66 - 50.0 MHz.

[2] *See Report and Order*, GEN Docket No. 83-325, 49 FR 1512 (January 1, 1984), 55 RR 2d 279 (1984). Under Part 15, cordless telephones may not cause harmful interference to services operating in accordance with the Table of Frequency Allocations, Section 2.106 of the Rules, and must accept any interference received.

[3] *See Order*, RM-4780, 2 FCC Rcd 7278 (1987).

[4] *See Order*, RM-5320, 2 FCC Rcd 7276 (1987).

[5] *See Memorandum, Opinion and Order*, RM-5320, adopted ____.

[6] *See Notice of Proposed Rule Making*, RM-6537, GEN Docket No. 89-_____. The *Notice* in RM-6537 was still on circulation when the Notice in this instance proceeding was sent to circulation.

[7] *See Report and Order*, GEN Docket No. 87-389, 4 FCC Rcd 3493 (1989).

[8] *See* 47 CFR 15.235 (1989), Operation within the band 49.82 - 49.90 MHz.

[9] Because the channels for cordless telephone operation are not all contiguous, we will provide flexibility only within the existing channels rather than over the 46.6-47.0/49.6-50.0 MHz frequency bands. For example, Channel 6 base units transmit at 46.770 MHz while Channel 7 uses 46.830 MHz -- a 60 kHz separation. The frequencies that fall between cordless telephone channels are used for Government operations on a primary basis in accordance with the Table of Frequency Allocations, 47 CFR 2.106.

[10] A copy of the inquiry from ASCII is being inserted in the record.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-543

In re Applications of

Yu-Hay Kong d/b/a CHINESE RADIO SERVICE (hereafter "Service")	File No. BPH-871109MA
ECHONET CORPORATION (hereafter "Echonet")	File No. BPH-871109MD
Esteban Don Lizardo & Matt Franich d/b/a LIZARDO-FRANICH PARTNERSHIP (hereafter "Partnership")	File No. BPH-871109MF
DAVID MARK JONSSON (hereafter "Jonsson")	File No. BPH-871109MN
SUSAN MARSZAL (hereafter "Marszal")	File No. BPH-871110ME
MEDIA WEST BROADCAST GROUP, INC. (hereafter "Media")	File No. BPH-871110MF
MICHAEL LUCKOFF (hereafter "Luckoff")	File No. BPH-871110MG
OLD TOWN BROADCASTING CORPORATION (hereafter "Broadcasting")	File No. BPH-871110MI
Maureen Vega *et al.* d/b/a THE VEGA FM GROUP (hereafter "Vega")	File No. BPH-871110ML
RIO AMERICANO COMMUNICATIONS CORP. (hereafter "Rio Americano")	File No. BPH-871110MM
Nicholas Henderson and Raveesh Kumra d/b/a SACRAMENTO BROADCASTING COMPANY (hereafter "SBC")	File No. BPH-871110MN
CAPITOL BROADCASTING, INC. (hereafter "Capitol")	File No. BPH-871110MS
ONE-O-THREE BROADCASTING CO., INC. (hereafter "One-O-Three")	File No. BPH-871110MT
MARGARET M. MARSTON OBENAUF (hereafter "Obenauf")	File No. BPH-871110MX
OLYMPIC BROADCASTERS, INC. (hereafter "Olympic")	File No. BPH-871110MY
FAHLDA BROADCASTING COMPANY, A CALIFORNIA LIMITED PARTNERSHIP (hereafter "Fahlda")	File No. BPH-871110NB
CALIFORNIA BROADCAST PARTNERSHIP (hereafter "CBP")	File No. BPH-871110NC
OLD SACRAMENTO BROADCASTING CO., INC. (hereafter "OSB")	File No. BPH-871110NJ
JAM FM LIMITED PARTNERSHIP (hereafter "Jam")	File No. BPH-871110NL
JACK L. POWELL (hereafter "Powell")	File No. BPH-871110NM
AMERICAN SIERRA BROADCASTING, INC. (hereafter "Sierra")	File No. BPH-871110NN
RIO DE ORO COMMUNICATIONS, INC. (hereafter "Rio De Oro")	File No. BPH-871110NO
SACRAMENTO FM BROADCASTERS LIMITED PARTNERSHIP (hereafter "FMBLP")	File No. BPH-871110NQ

GEORGE K. FUNG (hereafter "Fung") File No. BPH-871110NU

For Construction Permit for a New
FM Station on Channel 278A (103.5 MHz)
in Sacramento, California

HEARING DESIGNATION ORDER

Adopted: November 13, 1989; Released: January 22, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

JONSSON

2. 47 C.F.R. § 73.3522(a)(6) prohibits the filing of major amendments as a matter of right after the appropriate window filing period. On January 25, 1988, over two months after the close of the window for applications in the instant proceeding, Jonsson filed an amendment to change the applicant from his 100% individual ownership to his 50% interest in a joint tenancy with his wife, Joyce Helen Spilman, who would also hold a 50% interest. In pertinent part, 47 C.F.R. § 73.3573(b) defines a major amendment as that which would "result in a situation where the original party or parties to the application do not retain more than 50% ownership in the application as originally filed."

3. Clearly, Mr. Jonsson would not retain "more than 50% ownership" in the application. Mr. Jonsson's amendment is therefore a "suicide" amendment since its acceptance would constitute a major change requiring the assignment of a new file number to the application and would result in the dismissal of his application from the Sacramento proceeding. Consequently, the amendment will be returned and Mr. Jonsson provided 30 days from the release of this Order to file an amendment with the presiding Administrative Law Judge that restores its ownership to the *status quo ante*, or the presiding Administrative Law Judge is authorized to dismiss Mr. Jonsson's application. *See, e.g., St. Croix Wireless Co., A Limited Partnership*, 2 FCC Rcd 4447 (1987); *Redwood Television Ministries, Inc.*, 52 RR 2d 1365, 1369 (1982). *See also Tequestra Television, Inc.*, 2 FCC Rcd 41 (1987).

LUCKOFF

4. The Federal Aviation Administration has indicated that Luckoff must file with the FAA if it chooses to change the antenna height and/or ground elevation and coordinates for the existing (170 meters AGL/176 meters AMSL) antenna structure specified in Luckoff's application at 168 meters AGL/178 meters AMSL. Accordingly, an issue with respect thereto will be specified and the FAA made a party to the proceeding.

OBENAUF

5. The Commission requires that if there will be five or more fulltime station employees, the applicant must complete and file Section VI of Form 301, and supply a statement detailing hiring and promotion policies for women and each minority group whose representation in the available labor force is five percent or greater in the proposed service area. Although Obenauf filed such a statement, it is deficient since she did not list any women's organization that she would utilize to recruit female job applicants. Accordingly, Obenauf will be required to file an amended EEO program with the presiding Administrative Law Judge, or an appropriate issue will be specified by the Judge.

CBP

6. Information before the Commission indicates that CBP was organized and is affiliated with Sonrise Management Services ("Sonrise"). Sonrise has been the subject of numerous "real party-in-interest" issues added by presiding Administrative Law Judges in a number of mutually exclusive proceedings. For example, issues concerning Sonrise have been designated in each of the following proceedings:

City/State	Docket No.
Solona, Florida	87-464
Rockledge, Florida	87-556
Silver Springs, Florida	88-119
East Ridge, Tennessee	88-122
Oliver Springs, Tennessee	88-201
Des Moines, Iowa	88-238
Nags Head, North Carolina	88-277
Tyler, Texas	88-280
Raleigh, North Carolina	88-306
Sedona, Arizona	88-335
Mableton, Georgia	88-400
Evansville, Indiana	88-403
Swanton, Ohio	88-432
Atlantic City, New Jersey	88-433

Identical issues were specified in each of these proceedings: whether or not Sonrise was a real party in interest in the subject applicant, whether or not the applicant's organizational structure was a sham, and the effect thereof on the applicant's qualifications to be a Commission licensee. In each of the proceedings listed above, the Sonrise-affiliated applicant has dismissed its application rather than resolving these issues. These unresolved issues call into question CBP's qualifications to be a Commission licensee. Therefore, such issues will be specified and tried against CBP in this proceeding.

7. Item 5(e) of Section II, FCC Form 301 (October 1986) requires applicants to indicate if the applicant or any party to it has or has had an interest in "a broadcast application in any pending or concluded Commission proceeding which left unresolved character issues against the application." If answered in the affirmative, the applicant is to provide the name of the party having an interest, the nature of the interest or connection and dates, the call letters or file number of the application or docket number, and the location. Although CBP indicated, for example, that general partners Ravindrakumar J. Patel, Cheryl M. Savage and Sandra A. White were limited partners in Belle Chasse Radio Limited Partnership (File No. BPH-870527ME), it failed to timely amend

its application pursuant to 47 C.F.R. § 1.65 to notify the Commission that Belle Chasse Radio Limited Partnership's application was dismissed with prejudice. *Mary Faye Gilbert*, FCC 89M-1285 (released April 27, 1989). Accordingly, an appropriate issue will be specified below.

OSB

8. OSB proposes to mount its antenna 4.6 meters above the rooftop of a building that is also utilized as a heliport facility. Our engineering study indicates that this proposal may significantly exceed the ANSI guidelines for human exposure to radio frequency (RF) radiation as outlined in OST Bulletin No. 65 (October 1985). Consequently, we are concerned that OSB may have failed to comply with the environmental criteria set forth in the *Report and Order* in GEN Docket No. 79-163, 51 Fed. Reg. 14999 (April 12, 1986). Under the rules, applicants must determine whether their proposals would have a significant environmental effect under the criteria set out in 47 C.F.R. § 1.1307. If the application is determined to be subject to environmental processing under the 47 C.F.R. § 1.1307 criteria, the applicant must then submit an Environmental Assessment (EA) containing the information delineated in 47 C.F.R. § 1.1311. 47 C.F.R. § 1.1307 states that an EA must be prepared if the proposed operation would cause exposure of workers or the general public to levels of RF radiation exceeding specific standards. Since OSB's proposal may have a significant environmental impact as defined by 47 C.F.R. § 1.1307, it will be required to submit the environmental impact information described in 47 C.F.R. § 1.1311. Therefore, OSB will be required to file, within 30 days of the release of this Order, an EA with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of this case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting Corp.*, 71 FCC 2d 229 (1979), *recon. denied sub nom. Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980).

FMBLP

9. Broadcast Data Corp. is a limited partner in FMBLP, owning 40% of the partnership interest. FMBLP has stated on page 7 of Exhibit II of its application that

> [i]n an action relative to Broadcast Data Corp's parent company, Graphic Scanning Corp., by Order released August 24, 1982, the Commission designated for hearing applications filed by A.S.D. Answer and P.A.L. Communications Systems, Inc. The stated purpose of the proceeding was to determine the relationship between Graphic and the applicants and, in particular, whether Graphic is a real party in interest in the applicants. In an Initial Decision released January 5, 1985, the presiding Administrative Law Judge concluded (a) that, because of the non-traditional nature of the transactions involved, Graphic shall be deemed the real party in interest in the A.S.D., Vineyard, P.A.L. and B.W. applications; and (b) that all parties had exhibited a lack of candor and on occasion, intentionally misrepresented material facts to the Commission.

10. Claiming the above conclusions were without merit, Graphic filed exceptions with the Commission on March 15, 1985. After a proxy fight resulted in new management, Graphic asked the Commission to approve a settlement between the concerned parties. By its *Memorandum Opinion and Order*, released November 21, 1986, the Commission approved such an agreement vacating the conclusions reached in the *Initial Decision*. This action absolved the revised Graphic corporate entity from the Administrative Law Judge's adverse conclusions, but held that the findings would apply if former Graphic principals Yampol, Slodowitz and Finfer, who were active in management at the time of the alleged misconduct were to regain control of Graphic. *A. S. D. Answer Service, Inc. et al.*, 1 FCC Rcd 753 (1986), at paragraph 6. A petition for reconsideration of this action has been filed.

11. We also note that an affiliate of Broadcast Data Corp.'s parent company, Graphic Scanning Corp., has been named as a defendant in a lawsuit captioned *Utah Telecourier v. MCI Telecommunications Corporation, et al.* (W.D. Utah, 1984) in which the trading of interests in cellular radio telephone partnerships in connection with the Salt Lake City, Utah market has been challenged under state and federal anti-trust laws. *See, e.g. Meridian Communication*, MM Docket No. 87-177, 2 FCC Rcd 3630 (1987). Further, FMBLP states in its January 3, 1989 amendment that "a complaint was filed by the Securities and Exchange Commission in the United States District Court for the Southern District of New York alleging filing with the SEC of certain false, misleading and untimely statements concerning investment made in Graphic Scanning Corp. by Amster & Co., Arnold Marvin Amster, Barry Stuart Lafer, and Joel R. Packer in 1987." An appropriate condition will therefore be specified below.

OTHER MATTERS

12. *City Coverage*. While engineering data submitted by twelve of the applicants in this proceeding demonstrates that they will not provide a 3.16 mV/m signal to the entire proposed city of license, as required by Section 73.315(a) of the Commission's Rules, the FM Branch does not require waiver of this requirement unless the proposed 3.16 mV/m coverage falls below 80% of the residential area of the principal community. *See John R. Hughes*, 50 Fed. Reg. 5679 (February 11, 1985). *See also, Southwest Communications, Inc.*, released July 16, 1986 (letter from the Chief, FM Branch, reference 8920-HVT).[1] Our engineering study indicates that the 3.16 mV/m contours of the twelve applicants comply with this requirement. Accordingly, no waiver is required.

13. *Section II, Item 4*. Section II, Item 4 of FCC Form 301 (October 1986) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. Service did not complete this item; Broadcasting, Vega and Olympic have provided post office box numbers as the address for either themselves and/or principals to the applicant. Accordingly, each must submit an amendment which gives all the information required by Section II, Item 4 to the presiding Administrative Law Judge after this Order is released.

14. *Section II, Item 5*. Section II, Item 5 of FCC Form 301 (October 1986) requires applicants to provide an exhibit providing specific information if the applicant or any party to the application has or had any broadcast interests, including pending or dismissed applications.

This information must include the name of the party having interest, the nature of the interest or connection, the call letters or stations or file number of the application and/or docket, and the location. In his January 20, 1988 amendment, Luckoff states that he "is also an officer of Capital Cities/ABC Inc., which is the licensee of stations throughout the country including KGO (AM), San Francisco." In its June 6, 1988 amendment, FMBLP indicates that Billy J. Parrott has an interest in and connection with Cajun Broadcasting Co., apparently an applicant for new commercial television facilities at New Orleans, Louisiana. Further, FMBLP's amendment notes that Mr. Parrott's wife, Geraldine Parrott, is a 33 1/3% principal in an application filed May 18, 1988 by Female Frequency to serve Tice, Florida. Luckoff and FMBLP will be required to submit *all* required information concerning the above interests to the presiding Administrative Law Judge with the presiding Administrative Law Judge.

15. *Late - filed Amendments*. The applicants below petitioned for leave to amend their applications on the dates listed. The accompanying amendments were filed after January 26, 1988, the last date for filing minor amendments as of right.[2] Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

Applicants	Dates Filed
Echonet	February 16, February 17, April 26, June 6, July 12 and September 23, 1988; February 8 and June 14, 1989
Media	February 23, 1988
Broadcasting	October 3, 1989
Vega	August 15, 1988
SBC	June 6, 1989
Olympic	November 30, 1988
Fahlda	July 27, 1988, October 24, 1989
Sierra	March 2, 1988
Rio De Oro	April 7 and May 15, 1989 (Engineering)
FMBLP	February 1, April 18, April 29 and June 6, 1988; January 3 and April 17, 1989
Fung	August 23, 1988

16. *Area and Populations*. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

17. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

18. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the the tower height and location proposed by Luckoff would constitute a hazard to air navigation.

2. To determine whether Sonrise Management Services, Inc. is an undisclosed party to CBP's application.

3. To determine whether CBP's organizational structure is a sham.

4. To determine whether CBP violated Section 1.65 of the Commission's Rules and/or lacked candor by failing to report: (i) the designation of character issues against other applicants in which several of its owners have an ownership interest, and (ii) the dismissal of such applications with unresolved character issues pending.

5. To determine, from the evidence adduced pursuant to issues 2 through 4 above, whether CBP possesses the basic qualifications to be a licensee of the facilities sought herein.

6. If a final environmental impact statement is issued with respect to OSB, in which it is concluded that the proposed faciiity is likely to have an adverse effect on the quality of the environment, to determine whether the proposal is consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §§ 1.1301-1319.

7. To determine which of the proposals would, on a comparative basis, best serve the public interest.

8. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

19. IT IS FURTHER ORDERED, That the January 25, 1988 amendment filed by Jonsson IS HEREBY RETURNED, and that the applicant file an amendment with the presiding Administrative Law Judge restoring its ownership to the *status quo ante* within 30 days of the release of this Order.

20. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS A PARTY to this proceeding with respect to the air hazard issue only.

21. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Obenauf shall submit Section VI information in accordance with the requirement of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge.

22. IT IS FURTHER ORDERED, That, within 30 days of the release of this Order, OSB shall submit the environmental assessment required by 47 C.F.R. § 1.1311 to the presiding Administrative Law Judge, with a copy to the Chief, Audio Services Division.

23. IT IS FURTHER ORDERED, That in the event a construction permit is awarded to FMBLP as a result of this proceeding, its grant will be without prejudice to (i) whatever action, if any, the Commission may deem appropriate should former Graphic principals Yampol, Slodowitz and Finfer regain control of Graphic; the outcome of (ii) the appeal in *A. S. D. Answer Service, Inc. et al.*, CC Docket No. 82-587 *et seq*, (iii) *Utah Telecourier v. MCI Telecommunications Corporation et al.*, and (iv) the untitled complaint brought by the U. S. Securities and Exchange Commission in the District Court for the Southern District of New York alleging filing with the SEC of false, misleading and untimely statements.

24. IT IS FURTHER ORDERED, That Service, Broadcasting, Vega and Olympic shall submit an amendment containing the information specified in paragraph 13 hereinabove, to the presiding Administrative Law Judge within 30 days of the release of this Order.

25. IT IS FURTHER ORDERED, That Luckoff and FMBLP shall submit an amendment containing the information specified in paragraph 14 hereinabove, to the presiding Administrative Law Judge within 30 days of the release of this Order.

26. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Echonet, Media, Broadcasting, Vega, SBC, Olympic, Fahlda, Sierra, Rio De Oro, FMBLP and Fung ARE GRANTED and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

27. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

28. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

29. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTES

[1] The twelve are Service, Partnership, Jonsson, Marszal, Media, Broadcasting, Rio, SBC, One-O-Three, Olympic, FMBLP, and Fung.

[2] By executive order, the offices of the Commission were closed early on Thursday, December 24, 1987. December 25, 1987 was a holiday; therefore, the period for filing amendments as of right commenced at 3:00 P.M., Monday, December 28, 1987 and expired at 5:30 P.M., Tuesday, January 26, 1988.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-567

In re Applications of

GEORGE HENRY CLAY	File No. BPH-870327KB
G. DEAN PEARCE	File No. BPH-870330MY
ALABAMA RADIO MOVEMENT, INC.	File No. BPH-870331ML
JOHNNIE F. KNIGHT	File No. BPH-870414KG
MONTGOMERY BROADCAST PROPERTIES, LTD.	File No. BPH-870415KO
JCT BROADCASTING LIMITED PARTNERSHIP	File No. BPH-870415MB
Linda Breland Valeska d/b/a BRELAND BROADCASTING	File No. BPH-870415MI
JUNE N. PHELPS	File No. BPH-870415MM
DOUBLE LS BROADCASTING, INC.	File No. BPH-870415MN
WHITE BROADCASTING NETWORK, INC.	File No. BPH-870415MR

For Construction Permit for a New FM Station on Channel 241A in Montgomery, Alabama

Appearances

M. Fred Friedman and *DeWitt C. Conklin*, on behalf of Alabama Radio Movement; *Martin J. Gaynes*, *Robert M. Gurss*, and *Lonna M. Thompson*, on behalf of Johnnie F. Knight; *Eric S. Kravetz*, on behalf of Montgomery Broadcast Properties, Ltd.; *David D. Oxenford* and *John K. Hane*, on behalf of JCT Broadcasting Limited Partnership; *Stephen T. Yelverton*, on behalf of Breland Broadcasting; *Dennis F. Begley* and *Matthew H. McCormick*, on behalf of June N. Phelps; *Hilton L. Larkin*, *pro se*, on behalf of Double LS Broadcasting, Inc.; and *David L. Hill* and *Audrey P. Rasmussen*, on behalf of White Broadcasting Network, Inc.

DECISION

Adopted: December 19, 1989; Released: January 22, 1990

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

Board Member BLUMENTHAL:

1. This comparative broadcast proceeding involves eight mutually exclusive applications for authority to construct and operate a new commercial FM broadcast station on Channel 241A at Montgomery, Alabama. They are: Alabama Radio Movement, Inc. (Movement); Johnnie F. Knight (Knight); Montgomery Broadcast Properties, Ltd. (MBP); JCT Broadcasting Limited Partnership (JCT); Breland Broadcasting (Breland); June N. Phelps (Phelps); Double LS Broadcasting, Inc. (Double LS); and White Broadcasting Network, Inc. (White).[1] These applications (along with eleven others subsequently dismissed, *see* note 1) were designated for consolidated hearing on "air hazard" and "city coverage" issues, as well as on the customary standard comparative issue. *Hearing Designation Order*, 3 FCC Rcd 41 (1988). The air hazard issues were resolved in favor of the applicants by a series of summary decisions prior to hearing. In an *Initial Decision*, 4 FCC Rcd 4654 (1989) (*I. D.*), presiding Administrative Law Judge Edward J. Kuhlmann (ALJ) found each of the applicants entitled to a waiver of the city coverage requirements prescribed by 47 CFR § 73.315, and granted Knight's application after concluding that its fulltime quantitative "integration" proposal, as qualitatively enhanced, made it the preferred applicant. The proceeding is now before the Review Board on exceptions filed by the parties.

2. As would be expected, the bulk of the exceptions are directed against Knight, the winner below, who was awarded the highest comparative credit for its 100% quantitative fulltime ownership/management integration proposal, qualitatively enhanced by long-term local residence, a history of participation in local community activities, past broadcast managerial experience, and an auxiliary power source, *see Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965) (" *Policy Statement* "), as well as by a minority enhancement, *see West Michigan Broadcasting Co. v. FCC*, 735 F.2d 601 (D.C. Cir. 1984). Unless the Board were to reduce the comparative credit awarded to Knight by the ALJ, none of the other competing applicants (save perhaps JCT) could prevail, regardless of the merits of the others' exceptions directed to their own respective applications.[2] Because we reject the exceptions directed at Knight, and we also reject JCT's exceptions as to its own application, the exceptions relating to Phelps, Breland, MBP, Movement, Double LS, and White are wholly non-decisional. *See* 47 CFR § 1.282(b).

EXCEPTIONS

3. Breland contends that the ALJ erred in denying its petition, filed March 16, 1988, which sought dismissal of Knight's application based on Knight's specification of erroneous geographic coordinates for his transmitter site. *See Memorandum Opinion and Order*, FCC 88M-1313, released May 3, 1988 (ALJ). The erroneous coordinates placed the transmitter site approximately 798 feet from the intended location. Relying on recent *Hearing Designation Orders*, *see, e.g., Nicholasville Broadcasting Corp.*, 4

FCC Rcd 2574, 2575 (1989), and cases cited therein, Breland argues that the Commission's "hard look" processing policy mandates at every stage of the proceeding the dismissal of FM broadcast applications that specify incorrect tower site coordinates, including applications, like Knight's, already in hearing.[3]

4. In its *Report and Order on FM Application Processing*, 58 RR 2d 776, 782 (1985), the Commission adopted new procedures designed to expedite authorization of new or expanded broadcast service to the public. Applicants for commercial FM stations were strictly cautioned that, under the new "hard look" policy, "carelessly prepared, unprocessable applications" would not be permitted to burden the processing system; *see also FM Applications*, 58 RR 2d 166, 169 (1985) (Public Notice). It is legally immaterial, though, at this late stage of the proceeding, whether Knight's application might have been rejected under the staff's "hard look" processing guidelines. It is clear that these new processing guidelines were and are intended to be applied at the *initial* staff review stage, and nothing in the Commission's discussion of its "hard look" policy suggests that it is to be again utilized once the hearing process has begun. Insofar as we are aware, the singular standard for application amendments, once a hearing has been designated, remains as set forth in Section 73.3522(b) of the rules, 47 CFR § 73.3522(b); under that standard, minor ministerial mistakes that do not disrupt the hearing proceeding are rather freely permitted. *See Northampton Media Associates*, 3 FCC Rcd 5164 (Rev. Bd. 1988) (subsequent history omitted); *see also Family Broadcasting Group*, 93 FCC 2d 771, 774-775 (Rev. Bd. 1983), *review denied*, FCC 83-559, released November 29, 1983. We shall not unilaterally extend, or apply retroactively by our own ukase, the processing standard established expressly for *initial* staff review of a broadcast application.

5. Breland, MBP, and Phelps next contend that the ALJ erred in denying enlargement petitions, filed February 18, 1988 by MBP, and May 18 and September 30, 1988 by Breland, respectively, seeking site availability, financial, and related candor issues against Knight. *See Memorandum Opinion and Order*, FCC 88M-831, released March 25, 1988 (ALJ); *Memorandum Opinion and Order*, FCC 88M-2478, released August 1, 1988 (ALJ); and *Memorandum Opinion and Order*, FCC 88M-4149, released December 6, 1988 (ALJ).[4] Breland and MBP argue that, based on a declaration by Edward L. Davis, agent for the tower site (owned by his children and) specified by Knight, the requisite "meeting of the minds" between Knight and Davis did not occur, and that Knight thus had no "reasonable assurance" that his proposed transmitter site was available. The Davis declaration claimed that Davis and Knight never discussed potential terms or arrangements for a lease. Additionally, adverting to Knight's amendment to correct his erroneous site coordinates, Breland argues that the failure of either Davis or Knight to mention that Knight now proposed to mount his antenna atop a grain elevator on the Davis property demonstrates further that Knight never had an agreement to use the Davis property. For its part, MBP contends that in light of the alleged absence of the "meeting of minds" as to specific lease terms, a financial issue is required, because Knight could not reasonably and reliably estimate future costs. Finally, Phelps argues that a financial issue is warranted, because Knight testified that he had no written budget estimates other than for equipment.

6. The Commission has stated that its requirements concerning transmitter sites are satisfied when an applicant has contacted the property owner or owner's agent and has obtained "reasonable assurance" in good faith that the proposed site will be available for the intended purpose. *See FM Application Processing*, 58 RR 2d at 782; *see also William F. and Anne K. Wallace*, 49 FCC 2d 1424 (Rev. Bd. 1974). Here, Knight clearly has met the standard. Thus, a written Agreement submitted by Knight in response to MBP's enlargement petition, and signed by both Knight and Davis, reads as follows:

> **AGREEMENT**
>
> This document is intended to serve as written confirmation of an agreement entered into by and between Edward L. Davis and John F. Knight, Jr. on this 18th day of March, 1987.
>
> Mr. Davis has agreed to lease to Mr. Knight certain real property located at 1516 Mobile Road, Montgomery, Alabama. Mr. Knight has agreed to lease said property from Mr. Davis for the purpose of erecting a radio tower. It is fully understood and agreed to by Mr. Davis and Mr. Knight that the actual execution of said lease agreement is specifically contingent upon Mr. Knight's success in obtaining a FM Construction Permit.
>
> It is understood that the specific terms of the lease agreement are to be determined at the time of its execution and that the terms of said lease and the rental value of the property will be commensurate with other comparable commercial property similarly situated.

The ALJ properly concluded that, in light of the above agreement, Knight could in good faith assert that he had "reasonable assurance" for use of the Davis site. Moreover, a subsequent Davis declaration, referenced by Breland in its exceptions, claiming that he understood the agreement to mean only that he had spoken to Knight and agreed to discuss a lease if Knight wanted the property, is -- at minimum -- irrelevant to Knight's original good faith. Nor does it not undermine Knight's current "reasonable assurance," since Davis has never stated that the site is not available or, more importantly, that he intends to breach his written agreement with Knight. Davis' subsequent parole tergiversations do not nullify Knight's FCC claim to "reasonable assurance." Finally, Breland's reference to the absence of any reference in the pleadings to the grain elevator for Knight's site is insufficient for an issue. Davis himself has not suggested in his declarations that the grain elevator location was not within the scope of his agreement with Knight, and Breland's suggestions otherwise are wholly speculative. Breland has furnished no support to demonstrate that a dispute of fact exists between Knight and Davis over the use of the proposed site. Without such a factual dispute, no evidentiary hearing is summoned. *See Stone v. FCC*, 466 F.2d 316, 322-323 (D.C. Cir. 1972); *see generally also* 47 U.S.C. § 309(e). With respect to MBP's financial allegations regarding the leasing costs for the site, the ALJ found that Knight was familiar with current rents for similar uses, and that this knowledge entered into his assessment of his financial qualifications. *See Memorandum Opinion and Order*, FCC 88M-831, *supra*. MBP has

not shown otherwise. Last, Knight's failure to have prepared *written* budget estimates for himself is also not a basis, by itself, for a financial issue. *The Baltimore Radio Show, Inc.*, 4 FCC Rcd 6437, 6443-6444 (Rev. Bd. 1989) (lack of initial written cost estimates not grounds for financial issue). *See generally Northampton Media Associates*, 4 FCC Rcd 5517, 5518 (1989). Here, the ALJ found that Knight had reasonably ascertained the estimated cost for the proposed station, *see Memorandum Opinion and Order*, FCC 88M-4149, *supra*, and that is sufficient under the FCC certification requirements obtaining at the time Knight filed.

Knight's Integration Proposal

7. Breland, MBP, Double LS, and White challenge the ALJ's grant of fulltime ownership/management integration credit to Knight. Essentially, they contend that Knight's political and civic activities will preclude him from devoting the requisite 40 hours per week to his proposed station and that, at best, he is entitled only to parttime "integration" credit. As to Knight's civic activities, the record shows that Knight devotes only a few hours per month attending monthly and annual meetings, *I. D.*, para. 26, and there has been no showing that these activities are so extensive as to preclude Knight from fulfilling his broadcast commitment. Indeed, by the very nature of a broadcast station, extensive local civic involvement by a broadcaster is neither unusual, *see, e.g., Metroplex Communications, Inc.*, 4 FCC Rcd 8149, 8152-8153 (Rev. Bd. 1989), nor discouraged. In fact, the opposite is true. *See Policy Statement, supra*, 1 FCC 2d at 396.

8. The record also shows that Knight is, and proposes to remain, a Commissioner of Montgomery County, Alabama, an activity to which Knight claims to devote approximately two hours per week. *I. D.*, para. 26. Citing *Washoe Shoshone Broadcasting*, 3 FCC Rcd 3948, 3955 (Rev. Bd. 1988), the exceptors claim that Knight's fulltime "integration" proposal should be rejected as conflicting with his official duties. However, it appears that Knight mainly intends to devote Mondays to his county duties, *see* Tr. 418, apart from answering occasional calls and letters from constituents, *id.*, at 368. He has pledged to devote Tuesdays through Saturdays to the new station. Knight aptly observes also, we believe, that he is *currently* the Alabama State University Director of Communications and Public Affairs (as well as general manager of public broadcast station WVAS-FM), a position he has pledged to relinquish entirely upon a grant of his instant application, and that he now devotes 40 to 50 hours per week to these duties, in addition to his ongoing civic and political activities. In *Washoe Shoshone*, by contrast, we rejected a fulltime "integration" proposal of a city councilman, whose political activities occupied 30 (or more) hours per week. But, nothing on this record undermines Knight's representation that he can and will work 40 hours per week managing his new commercial station, consistent with his local office. In sum, Knight is entitled to the fulltime "integration" credit awarded by the ALJ.[5]

JCT's Integration Proposal

9. The ALJ rejected JCT's critical "integration" credit, because he found that Janet May, JCT's sole "general" partner, will not control the applicant in light of her perceived inability to make the capital contributions on which her equity share is entirely dependent. *I. D.*, para. 84. The ALJ also held that JCT's limited partnership agreement was fatally flawed, and that one of its two putatively "passive" investors had exercised control over the application from the outset. *Id.* JCT's exceptions argue that there is no record support for concluding that May will not purchase her equity interest in the applicant, but that her retention of a full 50% equity interest is not relevant to the "integration" analysis since May will retain 100% "voting control" under the JCT partnership agreement, *whatever* her ultimate equity share. It cites *Vela Broadcasting Co.*, 2 FCC Rcd 3663, 3666 (Rev. Bd. 1988), for the proposition that a provision allocating equity interests according to capital contributions is not cause for reduction of an applicant's "integration" credit. JCT further contends that its limited partnership agreement complies with the Commission's guidelines for insulation of its limited partners' interests, citing *Ownership Attribution*, 58 RR 2d 604, 613-620 (1985), and that May has made all of the recent and pertinent partnership decisions.

10. It is the Commission's long-standing practice in comparative cases to award "integration" credit at a quantitative level that corresponds to the integrating principal's ownership percentage of the applicant. *See, e.g., Merrimack Valley Broadcasting, Inc.*, 92 FCC 2d 506, 508, 516 (Rev. Bd. 1982) (70% ownership equity yields a 70% "integration" credit) (subsequent history omitted). Where there are *passive* equity owners (*i.e.*, "limited" partners or non-voting shareholders), only the equity interests of the *active* principals are calculated for comparative "integration" purposes and extrapolated to that applicant as a whole, a dynamic we recently discussed again in *Metroplex Communications, Inc.*, 4 FCC Rcd 8149, 8149-8150 (Rev. Bd. 1989). Here, because May is proposed as the sole "general" partner of JCT, it seeks a 100% "integration" credit through May. *Ceteris paribus*, she would have it. *See Independent Masters, Ltd.*, 104 FCC 2d 178, 185-192 (Rev. Bd. 1986) (10% sole "general" partner garners 100% *effective* "integration" credit).

11. However, we here find that May's claim to a 50% equity share in JCT is entirely speculative at this point, because the JCT partnership agreement provides that the actual equity position of each of JCT's three principals shall ultimately depend upon their respective purchase of partnership shares. The JCT agreement expressly specifies that there shall be 200 partnership shares overall, at a cost of $2000 each. Should a partner fail to timely purchase his or her JCT shares, those shares must be offered to another JCT partner. In order to acquire her 50% equity interest, May must contribute her *pro rata* portion, which (according to JCT) might run from $30,000 to $50,000 just in application prosecution costs. *I.D.*, paras. 35-36.

12. But, the record here raises, at a minimum, critical doubt that May is in a position to purchase any of her partnership shares. Although she originally contributed $2,500 in capital from her personal funds, she subsequently withdrew that amount in the face of dire financial distress. For example, May has accumulated approximately $50,000 in personal debt, including an IRS tax lien against her for $7,405,[6] I.D., paras. 35-36, and has lost her business office (and perhaps her home as well). *Id.*, para. 36. Moreover:

> Thomas May & Associates, an advertising agency she owns . . . [has] been subjected to lawsuits and liens by lending institutions, a realty company, product and service suppliers and the state and federal gov-

ernments. She removed her office to her home and has settled claims which led to a scheduled sheriff's sale of her home.

Id. At the close of this hearing record, JCT's expenses had already reached $25,000, *id.*, para. 35, and her "limited" partner, Hunter White, testified that May might well be unable to purchase her anticipated shares. *Id.* As a matter of fact, May conceded that she might end up with as little as 1% of JCT's equity; but JCT nonetheless argues that even with only 1% of the total equity, May, as the sole "general" partner, would yet entitle JCT to an effective 100% "integration" credit.

13. Under the above circumstances, we shall not disturb the ALJ's refusal to award "integration" credit based upon May's *potential* ownership interest in JCT. As we view this record, it is unclear, if not now exceedingly doubtful, that May will be able to acquire any significant equity in JCT in the near future, let alone the 50% equity interest she initially proposed to purchase. Moreover, even if we started our analysis with the unlikely premise that May now "holds" a 50% equity interest in JCT, it is admitted that her share could drop to the infinitesimal level of 1% (or, conceivably, below). The Board has long held that it will not grant "integration" credit based on a specified equity percentage where there exists a substantial likelihood that percentage might drop dramatically, as by the exercise of options by another party. *Washington's Christian TV Outreach, Inc.*, 94 FCC 2d 1360, 1366 and n.9 (Rev. Bd. 1983); *see also Washoe Shoshone Broadcasting* 3 FCC Rcd 5631, 5635 (Rev. Bd. 1988) (no "integration" credit awarded where applicant's ownership structure is "in flux").[7] We agree that May's potential ownership interest, and the percentage of any such interest, is purely speculative at this point, and that JCT has not met its bedrock burden of proving out its "integration" entitlement. *See generally Knoxville Broadcasting Corp.*, 103 FCC 2d 669, 687-689 (Rev. Bd. 1986) (each applicant bears burden of proving "integration" entitlement); *see also Ft. Collins Telecasters*, 103 FCC 2d 978, 986-988 (Rev. Bd. 1986).[8]

14. In light of our disposition that JCT's "integration" proposal is too uncertain to be credited, we will not consider the exceptions as to the ALJ's additional grounds for disapproving JCT's integration proposal.

15. ACCORDINGLY, IT IS ORDERED, That the application of Johnnie F. Knight (File No. BPH-870414KG) for a Construction Permit for a new FM broadcast station at Montgomery, Alabama IS GRANTED; that the applications of George Henry Clay (File No. BPH-870327KB) and G. Dean Pearce (File No. BPH-870330MY) ARE DISMISSED; and that the applications of Alabama Radio Movement, Inc. (File No. BPH-870331ML), Montgomery Broadcast Properties, Ltd. (File No. BPH-870415KO), JCT Broadcasting Limited Partnership (File No. BPH-870415MB), Breland Broadcasting (File No. BPH-870415MI), June N. Phelps (File No. BPH-870415MM), Double LS Broadcasting, Inc. (File No. BPH-870415MN) and White Broadcasting Network, Inc. (File No. BPH-870415MR) ARE DENIED; and

16. IT IS FURTHER ORDERED, That the Petitions for Leave to Amend filed by JCT Broadcasting Limited Partnership on July 14 as supplemented on July 21, 1989; October 12, 1989; and October 30 as supplemented on November 6, November 14, and November 22, 1989 ARE GRANTED, and the amendments ARE ACCEPTED; that the Petition for Leave to Amend filed by June N. Phelps on July 31, 1989 IS GRANTED, and the amendment IS ACCEPTED; that the motion to dismiss filed by JCT Broadcasting Limited Partnership on July 18, 1989 IS GRANTED; that the respective motions to dismiss filed by June N. Phelps on July 18, 1989 ARE DENIED; and that the motion to dismiss and the motion to strike, filed, respectively, by Johnnie F. Knight on July 24, 1989 ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

FOOTNOTES

[1] Two other applicants, George Henry Clay and G. Dean Pearce, have not filed exceptions to the denial of their applications by the *Initial Decision*. Consequently, their applications are dismissed pursuant to 47 CFR § 1.276(f). *See, e.g., Breaux Bridge Broadcasters, Limited Partnership*, 4 FCC Rcd 4995 (Rev. Bd. 1989).

[2] The ALJ positioned Phelps second in the comparative qualitative rankings by virtue of her long-term local residence, excellent civic participation and broadcast managerial experience. She also is entitled to a gender preference which Knight lacks. However, she lacks a minority preference (which Knight received); and as the ALJ correctly found, minority credit is deserving of greater weight than gender credit. *Horne Industries, Inc.*, 98 FCC 2d 601, 603 (1984). Breland and MBP similarly lack minority credit and are also inferior on civic participation and past broadcast managerial experience. Double LS trails Knight on local residence, civic participation, and past broadcast experience. And, Movement seeks no quantitative "integration" credit. Its argument that its minority operation, *per se*, is sufficient to allow it to prevail, has previously been rejected by the Commission in *Las Misiones De Bejar Television Co.*, 93 FCC 2d 191 (Rev. Bd. 1983), *review denied*, 56 RR 2d 1481 (1984). Finally, White has a lesser length of local residence and inferior breadth of civic activities, but in any event, did not challenge the ALJ's qualitative rankings. *See* 47 CFR § 1.277(a) ("any objection not saved by exception filed pursuant to this section is waived").

[3] By *Memorandum Opinion and Order*, FCC 88M-1313, *supra*, the ALJ accepted Knight's curative amendment, filed April 14, 1988, correcting the erroneous coordinates.

[4] MBP's petition there requested site availability, financial, and related candor issues. The petition filed by Breland also sought a site availability issue. Breland's later petition requested a financial issue.

[5] Breland would also have the Board overturn the ALJ's finding that Knight was entitled to a city-grade coverage waiver. It argues that, because Knight's tower is located nearer to the city of Montgomery than some of the other applicants, Knight's coverage beyond the city is relatively inferior. Knight, however, observes that there is no comparative coverage issue in the proceeding, or any evidence as to the difference in total coverage among the applicants. Moreover, Knight's proposal covers 83.6% of the population and 63.7% of the area of Montgomery,

whereas Breland's proposal covers only 78.6% of the population and 63.1% of the area. Knight Reply Br. at 14-15. We therefore affirm the ALJ's finding.

[6] May owns an advertising agency that is experiencing severe financial problems. *I.D.*, para. 36. The ALJ found that the tax lien occurred after May hired two people for the agency, withheld federal taxes from their paychecks to pay the government, and then used the money for other purposes. *Id.*, para. 35.

[7] *Vela Broadcasting Co., supra,* relied upon JCT, is inapposite. In *Vela,* which involved a general partnership where all of the principals proposed to be integrated into the station operation, an argument was raised that the applicant's "integration" proposal should be discounted as lacking in permanence because the partnership agreement did not explicitly include a provision guaranteeing each partner's share against disappearance or diminution. Rejecting that novel argument, we found that there was nothing in the agreement (or the facts) that would support any inference that the partnership was ephemeral. Here, by way of contrast, there is an explicit provision allowing for the disappearance of the "general" partner's equity interest, as well as a factual setting suggesting the substantial likelihood of a significant equity diminution.

[8] Insofar as JCT argues that it would be entitled to a 100% "integration" credit, even if May's equity share dropped to 1%, suffice it that no Board or Commission decision has ever awarded so great an "integration" credit on so minuscule an equity interest. Indeed, the Board has on several occasions questioned whether mere fragmentary ownership interests may (or should) be extrapolated to 100% comparative "integration" credit. *Metroplex, supra,* 4 FCC Rcd at 8160 (citing *Religious Broadcasting Network,* 3 FCC Rcd 4085, 4106 n. 37 (Rev. Bd. 1988)). Without some special showing as to likely management control, we question whether such fractional equity interests could generally translate into complete supervisory dominion over a licensee. (As in *Metroplex,* the Board Chairman does not join in this aspect of the opinion.)

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 85-216

In re Applications of

MARLIN BROADCASTING OF CENTRAL FLORIDA, INC.	File No. BCPT-850319KF
SUNSHINE TELEVISION 27, INC.	File No. BCPT-850320KN
REECE ASSOCIATES, LIMITED	File No. BCPT-850320KR
MAGIC CITY BROADCASTING, INC.	File No. BCPT-850320KU
ORLANDO 27, INC.	File No. BCPT-850320KX
HIGHLAND COMMUNICATIONS, LTD.	File No. BCPT-850320LA
CENTRAL FLORIDA TELEVISION, LTD.	File No. BCPT-85032OLD
FLORIDA TELEVISION COMPANY	File No. BCPT-85032OLM

For Construction Permit
for a New Television Station
Orlando, Florida

Memorandum Opinion and Order

Adopted: January 2, 1990; Released: January 22, 1990

By the Review Board: MARINO (Chairman), BLUMENTHAL, ESBENSEN.

1. The Board has before it a "Petition for Reconsideration," filed December 13, 1989 by Highland Communications, Ltd., an applicant whose exceptions to an *Initial Decision* were denied in our *Decision*, 4 FCC Rcd 7945 (Rev. Bd. 1989), in the above-styled comparative licensing proceeding. Also before the Board is an "Opposition" to Highland's petition, filed on December 22, 1989 by Reece Associates, Limited, the applicant that prevailed over all other competing applicants both before the Administrative Law Judge and the Board.

2. In its petition, Highland openly stipulates that it raises solely a "non-decisional" matter,[1] and the Board finds, therefore, that Highland has not met any of the threshold tests for reconsideration provided in Section 1.106 of the Commission's Rules, 47 CFR § 1.106. Reconsideration, and the attendant delay in this multi-party licensing case, is most plainly unwarranted. Objections by Highland to the Board's *Decision* may be addressed in any Application for Review that Highland might choose to file with the Commission under Section 1.115 of the Rules, where its instant arguments could be given full and fair consideration.[2]

3. ACCORDINGLY, IT IS ORDERED, That the Petition for Reconsideration filed December 13, 1989 by Highland Communications, Ltd. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

FOOTNOTES

[1] Highland Petition at 1.

[2] Highland's request for reconsideration is limited to footnote 18 of the Board's *Decision*, in which we noted that at least one of Highland's principals may have participated in the submission of a sham application in a Rockledge, Florida broadcast licensing proceeding. *See Rockledge Radio, Ltd.*, 4 FCC Rcd 5092 (Rev. Bd. 1989). However, in view of the fact that Reece here prevailed over Highland in this proceeding on other substantive grounds, the Board found no immediate need in this case for a remand to explore the previous conduct of any of Highland's principals in the Rockledge, Florida case, conduct that may be examined, if necessary, at some more appropriate occasion. *Cf. Allegan County Broadcasters, Inc.*, 83 FCC 2d 371, 373-374 (1980).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-240

In re Applications of

ALBERT E. GARY	File No. BPH-851029MH
KILLINGTON BROADCASTING, LTD.	File No. BPH-851030MN
MOUNTAIN BROADCASTING LIMITED PARTNERS	File No. BPH-851030MP
ELF BROADCASTING COMPANY	File No. BPH-851030MQ
KILLINGTON, LTD.	File No. BPH-851030MZ

For Construction Permit for a New
FM Station on Channel 287C2,
in Killington, Vermont

Appearances

Dennis F. Begley, Esq., Matthew H. McCormick, Esq., and *Cheryl A. Kenny, Esq.* on behalf of Albert E. Gary; *William A. Crispin, Esq.* and *Dean R. Brenner, Esq.* on behalf of Killington Broadcasting, Ltd.; *B. Jay Baraff, Esq.* and *Lee J. Peltzman, Esq.* on behalf of Mountain Broadcasting Limited Partners; *Richard Hildreth, Esq., Vincent J. Curtis, Jr., Esq., Robert A. DePont, Esq.* and *Jill F. Pender, Esq.* on behalf of Elf Broadcasting Co.; *Robyn G. Nietert, Esq.*, and *Robert J. Rini, Esq.* on behalf of Killington, Ltd.; and *Charles E. Dziedzic* and *Y. Paulette Laden, Esq.* on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF
ADMINISTRATIVE LAW JUDGE
RICHARD L. SIPPEL

Issued: January 8, 1990; Released: January 22, 1990

PRELIMINARY STATEMENT

1. This proceeding involves the mutually exclusive applications of the five remaining applicants in this case: Albert E. Gary ("Gary"), Killington Broadcasting, Ltd. ("KBL"), Mountain Broadcasting Limited Partners ("MBLP"), Elf Broadcasting Company ("Elf") and Killington, Ltd. ("KL"). The applicants are competing for a construction permit for a new FM Station on Channel 287C2 in Killington, Vermont.

2. This was originally an eight party case. *Albert E. Gary, et al., Hearing Designation Order* DA 88-695, released May 24, 1988, 3 F.C.C. Rcd 2997 (1988), 53 Fed. Reg. 20015 (June 1, 1988). The applications of Bruce Lyons and Killington Community Broadcasting Corporation were dismissed voluntarily. *See Order*, FCC 88M-425, released February 8, 1989. The application of Radio Group, Inc. was dismissed for its defaults and its failure to prosecute. *See Memorandum Opinion and Order*, FCC 89M-854, released March 16, 1989, *aff'd* Review Board Slip Op. FCC 89R-28, released May 18, 1989, 4 F.C.C. Rcd 4112 (1989).

Phase I

3. The following issues were set by the Commission under the *Hearing Designation Order, supra* :

> 1. To determine whether there is a reasonable possibility that the tower height and location proposed by Mountain would constitute a hazard to air navigation.
>
> 2. If a final environmental statement is issued with respect to Gary, Killington Broadcasting, Killington Community, Mountain, Elf, Radio Group and Killington Ltd., in which it is concluded that the proposed facilities of one or more of those applicants is likely to have an adverse effect on the quality of the environment to determine whether the proposal of any such applicant is consistent with the National Environmental Policy Act, as implemented by Sections 1.1301-1319 of the Commission's Rules.
>
> 3. To determine which of the proposals would, on a comparative basis, best serve the public interest.
>
> 4. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

It also was provided by the Commission that evidence on comparative coverage would be taken for the purpose of determining whether a comparative coverage preference should accrue to any of these applicants. *Id.* at Para. 14.

4. By *Order*, FCC 88M-2322, released July 20, 1988, the contingent environmental issue against Gary, MBLP and Elf was resolved in their favor. By *Order*, FCC 88M-2751, released August 23, 1988, KL's amendment in response to the environmental impact issue was accepted and it was ordered that any grant would be subject to a condition of compliance with certain prescribed radiation limits. By *Order*, FCC 88M-2754, released August 23, 1988, an amendment filed by KBL regarding the contingent environmental issue also was accepted. Any grant to KBL also would be subject to a condition of compliance with prescribed fence construction before program test authority will be granted by the Bureau. The air hazard issue against Mountain was resolved in its favor by *Order*, FCC 88M-2752, released August 23, 1988. A prehearing conference was held on August 25, 1988, pursuant to the Presiding Judge's *Prehearing Conference Order*, FCC 88M-1671, released May 31, 1988 and supplemented by *Order*, 88M-2180, released July 11, 1988. Hearing sessions were held on March 6-10, March 13, and March 16, 1989. The record in Phase I of this proceeding was closed on March 16, 1989. All parties timely filed their Proposed Findings.

Phase II

5. The following financial certification/misrepresentation issue was added against Elf by the Presiding Judge in his *Memorandum Opinion and Order*, FCC 89M-1240, released April 21, 1989:

> 1. To determine whether Elf misrepresented facts or lacked candor when it certified that it was financially qualified to construct and initially operate its proposed station.
>
> 2. To determine in light of the evidence received under the above issue whether Elf possesses the requisite qualifications to be a Commission licensee.

The burden of proof and the burden of proceeding were assigned to Elf. *Id.* Hearing sessions on the added issue were held June 14 and 15, 1989. Proposed Findings were to be filed on August 11, 1989, and Reply Findings were due September 1, 1989. All parties timely filed their proposed findings.

FINDINGS OF FACT

Standard of Proof

6. This decision addresses first those issues which are qualifying and secondly the comparative issues. The decision is rendered in accordance with the Commission's standards at 47 C.F.R. §1.267(b) (initial decision to include findings of fact and conclusions of law as well as reasons or basis therefore). The burden of proof on the issues are with the respective parties. This is an administrative proceeding tried under §5 of the Administrative Procedure Act [5 U.S.C.A §§551 *et seq.* | and the preponderance of the evidence standard applies. *Steadman* v. *S. E. C.*, 450 U.S. 91, 101 S.Ct. 999, 1007 (1981). References to exhibits shall be: "Gary Exh. for Albert E. Gary; "KBL Exh. " for Killington Broadcasting, Ltd.; "MBLP Exh. " for Mountain Broadcasting Limited Partnership; "Elf Exh. , " for Elf Broadcasting Co.; and "KL Exh. " for Killington, Ltd. Testimony is cited where practicable by the name of the witness followed by the transcript page number, *e.g.*, "Smith, Tr. 0001." References to Proposed Findings of Fact and Conclusions of Law are designated "PFC" and references to Reply Findings and Conclusions are designated "RPFC."

7. Since the five applications are mutually exclusive, a consolidated factual hearing was conducted on all issues wherein the parties presented evidence and conducted cross-examination. *Ashbacker Radio Corp.* v. *F. C. C.*, 325 U.S. 327, 333 (1945).

Elf's Qualifying Issues

8. Elf is the only party that must meet qualifying issues. *See* Para. 5, *supra*. Elf's sole general partner, Gary Elfstrom ("Elfstrom"), relied on cost estimates for a Class A FM station in the Killington area for estimating the costs of the Class C2 FM facility at issue in this case. Elfstrom and two limited partners were to put up the estimated cash needs of $220,000 on a *pro rata* basis (20-40-40). Elfstrom relied on oral conversations with an engineer consultant and the two limited partners for his assurances of the ability to construct and operate for three months. Elf contends that Elfstrom knew that he could furnish 20% of the funds. And based on discussions with the limited partners as to their financial capability to support their respective 40% commitments and Elfstrom's evaluation of their being successful, responsible and credible professionals, Elfstrom certified as to Elf's financial capability. *See* Elf PFC Phase II at i-iii. The facts and circumstances presented during the pretrial phase established a *prima facie* showing of the need to hear evidence and make findings on the issues of whether Elf had a reasonable assurance and, if not, whether Elf misled the Commission. *Armando Garcia*, 3 F.C.C. Rcd 1065 (Review Bd 1988). But, if the preponderance of the evidence establishes that Elf's assurance was a reasonable one, the applicant will be further considered under the standard comparative issue below.

9. Elf's limited partners are Elio Betty ("Betty") and Hugh Puglia ("Puglia"). In September 1985, Elfstrom was introduced to Betty at a social gathering in a hotel bar by Elfstrom's supervisor at Station WNNE-TV, Charles Webb ("Webb"). (Elfstrom, Tr. 1526; Betty, Tr. 1745.) Betty told Elfstrom that he and Puglia, his brother-in-law, were planning to file an application for the Killington FM Station. Betty also told Elfstrom that they were seeking a general manager and asked Elfstrom if he were interested. (Elfstrom, Tr. 1526.) Although Elf's Proposed Findings state nothing on the point, it appears that Elfstrom decided to consider the offer for he is not shown to have rejected or accepted it at that first meeting with Betty. (*See* Elf's PFC Phase II at 6-7.)

10. Later, Elfstrom asked Webb for more information about Betty. Webb said that he knew Betty well and that Betty had experience in broadcast communications. Betty had worked for ABC Network for a number of years. He also had worked for the Financial News Network. (Elfstrom, Tr. 1528-29, 1535.) with that information, Elfstrom told Betty in a telephone call that he was interested in the Killington project. (Elfstrom, Tr. 1749.) On October 10, 1985, approximately 20 days before Elf's application was filed, Elfstrom met with Betty and Puglia in New York City at the Reginette restaurant to discuss the project. (Betty, Tr. 1749; Elfstrom, Tr. 1533.) It was determined that in order to pursue the Killington venture, Elfstrom would have to give up his interest in the adjacent Lebanon AM project on which he believed he "had a lock." (Elfstrom, Tr. 1534.)

11. The promoters of what was to become the Elf venture were Betty, the broadcast investor,[1] and his brother-in-law, Puglia the business lawyer. Betty had an interest in a Vermont broadcast outlet and he had an engineer on the lookout for one. (Betty, Tr. 1741.) In mid-year of 1985, Betty learned of the Killington opportunity which was to close on October 30. *Id.* Betty alerted Puglia to the opportunity and they decided to pursue it. (Betty, Tr. 1742.) Then followed the "social" introduction of Elfstrom to Betty by West at the Reginette where Elfstrom had to decide to take on new partners, be prepared to divest Lebanon, and commit to 20% of the expenses of construction and operating at Killington. (Elfstrom, Tr. 1535.)

12. Elf requests that the spadework done in the estimation of costs for the Lebanon station be considered as a proxy for a cost estimate for the FM station at Killington.[2] Elfstrom and his partners relied on the Lebanon estimates when they met on October 10, 1985, where Elfstrom told Betty and Puglia they would need $220,000. (Elfstrom, 1535-36; Betty, Tr. 1753, Puglia, Tr. 1787.) Betty thought that a more realistic "ballpark" range to use for planning

was $300,000 to $500,000, which would include the legal fees for prosecuting the application. (*See* Elf's PFC Phase II at 9.) Elfstrom convinced his new partners that since he had actually completed a lower cost estimate for the Lebanon station, the $222,000 figure was the more reliable. (*Id.* ; Betty, Tr. 1753.)

13. One of the key distinctions made by the engineer who was advising on costs was the difference in the costs of a transmitter. The cost would be greater for the Killington transmitter because it was a Class C2 facility. That general conclusion was allegedly qualified with the rationale that since the Killington site would be on a mountain, the cost difference would be minimal. (Elfstrom, Tr. 1497, 1553.) Elfstrom dissembled in key aspects of his related testimony. Initially, Elfstrom testified that the engineer had advised him that the only difference between the two stations as far as cost was concerned would be studio equipment. (Elfstrom, Tr. 1499, 1502.) Elfstrom subsequently changed his testimony and claimed that the engineer advised him that the difference would be in the transmitter equipment. (Elfstrom, Tr. 1502.) While he testified repeatedly that the engineer said that there would not be much difference in costs for the two facilities because the Killington station would be located on a mountain, he could not recall telling the engineer where the Killington station would be located:

> Q. What did you tell him about the proposed station in Killington?
>
> A. He asked me where it was going to be, and I said its going to be located in Killington.
>
> Q. What else did you tell him about the location:
>
> A. I don't recall specifics, I mean---
>
> Q. You told him it was simply located in Killington?
>
> A. Yes.
>
> Q. And that's the best of your recollection?
>
> A. Yes.

(Elfstrom, Tr. 1580.) Certainly the cost savings would be substantial based on the mountain location. Yet Elfstrom was so vague about what he told the engineer, on whom he was relying for advice incident to certification, that the accuracy of Elfstrom's proxy cost estimate is found to be unreliable. Therefore, the Lebanon estimate is rejected as an element of Elf's reasonable assurance of its financing.

14. During the same October 10 meeting, there was discussion among the three partners as to how each would pay their respective percentage of the estimated costs. Elfstrom told Betty and Puglia that the equity in his home would cover his 20% of the estimated $220,000 ($44,000). (Elfstrom, Tr. 1537.) Betty and Puglia related to Elfstrom that they had home equities and stock in amounts that would cover their respective 40% commitments ($88,000 each). (Elfstrom, Tr. 1537, 1661-62; Betty, Tr. 1754-56; Puglia, Tr. 1787-88.) But while there were optimistic statements regarding the quality of homes and investments, there was nothing discussed about debts and obligations that would offset equity interests.

15. Apparently, Elfstrom relied on such things as Betty's statement that he had "done very well" with his home in Darien. Betty had two homes and Elfstrom was aware of that fact. Elfstrom identified Darien as a wealthy community, and Elfstrom was told that Betty belonged to the "exclusive" Darien Country Club. (Elfstrom, Tr. 1542, 1554-55; Elf's PFC Phase II at 10-11.) Elfstrom had been told by Webb that Betty was a broadcast executive who had worked for the ABC Network and who at the time was employed as a senior vice president of the Financial News Network in New York City. (Elfstrom, Tr. 1529-31; Betty, Tr. 1747.) Elfstrom also was impressed with being told about Betty's holdings in FNN stock (no specifics given) and Betty's Jaguar automobile with a cellular phone (no evidence that he saw it). (Elfstrom, Tr. 1647; Betty, Tr. 1777.)

16. Puglia has been a practicing attorney since 1953. He has been engaged primarily in business real estate and estate related law. (Puglia, Tr. 1783-84, 1800.)[3] Puglia had made no input into the estimate of Betty for costs in the range of $300,000 to $500,000. (Puglia, Tr. 1793.) Puglia made clear that he does not receive a "salary." (Puglia, Tr. 1796-97.) Therefore, Betty and Elfstrom did not know Puglia's annual earnings.[4] Puglia told Elfstrom for purposes of reasonable assurance of funding that he (Puglia) has "substantial equity in real estate" and he owned a home "that was virtually free and clear of a mortgage." (Puglia, Tr. 1787.) Puglia also told Elfstrom that he had "equity in a home in the Hamptons" and "some investments and bank accounts." (Elfstrom, Tr. 1539; Puglia, Tr. 1787-88; 1809.) Puglia did not give any reasonable measure of what the value of his "equity" was at the time that he spoke with Elfstrom on October 10. Nor does the testimony establish that Puglia gave Elfstrom a dollar value for his bank accounts or other investments. Elfstrom testified that when Puglia said "equity" Elfstrom understood Puglia to mean net equity. (Elfstrom was engaging in revisionist history because the inference is equally raised that Puglia did not want to disclose the full extent of his liabilities, particularly at the first meeting with Elfstrom that took place in a restaurant.)

17. Elf makes clear in its proposed findings the universe of the evidence on which Elfstrom was relying of the partnership's financial ability when he certified. On October 10, 1985, just twenty days before certification, the three partners discussed the assets (home equity, stock and bank accounts) of Betty and Puglia. Elfstrom also had learned that Puglia was Betty's brother-in-law, that he was a practicing attorney and a former County Magistrate. Elf submits:

> As a result of the discussions concerning their mutual financial commitments to the applicant at the meeting, and in light of what he had learned about Betty and Puglia, Elfstrom believed he could properly make a financial qualification certification to the Commission in the Elf application.

(*See* Elf's PFC Phase II at 11-12 derived from Elfstrom, Tr. 1541, 1595, 1611- 12.) While there is considerable testimony from all three partners to establish the fact that the subjects of home equity, investments and bank accounts were discussed, the evidence establishes by negative inference that individual net assets in dollar amounts were not disclosed and the extent of the individual partners' liabilities were not disclosed. Prior to certification, there were no balance sheets or other financial statements for Betty or Puglia made available to Elfstrom.

18. Elfstrom defends his failure to request financial statements on grounds that he was not aware that he was required to obtain such items for purposes of reasonable assurance at certification. (Elfstrom, Tr. 1543.) Elfstrom also testified that prior to certification he received all the above information with counsel and no legal advice was given to him that he must or should first obtain documentation. (Elfstrom, Tr. 1545, 1547-48, 1633-34; Elf's PFC Phase II at 12 n. 10.) From these facts a finding will be made that the subject of documentation of financial ability was not discussed with counsel prior to certification. But counsel did not advise Elfstrom not to obtain the documentation. Specifically,

> Q. (Mr. DePont): Did he, did Mr. Hildreth advise you of any need to obtain financial documentation?
>
> A. (Mr. Elfstrom) No.

(Elfstrom, Tr. 1548.) These facts do not support a finding that Elfstrom relied on advice of counsel in not securing documentation from Betty and Puglia of their abilities to meet 80% of the venture's financing needs.

19. The inference drawn that Elfstrom should have known to require documentation is based on the facts that (1) Elfstrom had only spoken twice with Betty and once with Puglia; (2) Elfstrom had no prior business or social relations/experience with Betty and Puglia and thus had no past history basis on which to rely; and (3) Elfstrom was an experienced businessperson who had been in the business of checking out people's credit. (Elfstrom, Tr. 1644.) The broad discussion about purported equities, an expensive car and country club membership would not be sufficient information for a prudent businessperson to embark on a project that he thought would cost $220,000 and which would require 80% financing from virtual strangers. To illustrate the unreasonableness of Elfstrom's certification, Betty, an established businessperson, was asked on cross-examination whether he had ever entered into another venture without securing details on the financial capabilities of partners. He testified that he made a recent investment in a sports marketing company where one of his partners was a stranger. While he did not seek a financial statement from that person, the venture was not requiring individual financing from partners. Rather, it was relying on an outside source. (Betty, Tr. 1767-68.) Thus, the past experience of Betty, one of the limited partners, supports a finding that Elfstrom was unreasonable in claiming assurance at certification that he and his partners had the ability to finance the project without first obtaining evidence of their net worths, or without arranging for a funding commitment from a financial institution.

20. There also is evidence that prior to the hearing, Elfstrom was contemplating relying on a "banking" source. While golfing with Mr. Thomas Hill ("Hill") sometime in 1985,[5] Elfstrom and Hill discussed "the possibilities of financing a radio station at that time." (Hill, Tr. 1828.) Generalities were discussed as to the amount that might be needed but Hill never assured Elfstrom that he would provide $100,000 to $500,000 in financing. There was never any oral commitment given to Elfstrom. (Hill, Tr. 1829-30.) While Hill was not with an operating bank at that time, he was familiar with banking procedures. Hill testified that when he spoke with Elfstrom on the golf course, Hill was employed by an institution called the Valley Bank which was in the formative stages but not yet operative. Application had been filed with FDIC and the Vermont Department of Banking. Valley Bank opened for business in March 1987.

21. Hill testified that a bank would require a *pro forma* operating statement, individual tax returns, personal financial statement and estimated future income expected from the business venture. (Hill, Tr. 1829.) Hill did not recall ever receiving any such documentation from Elfstrom and he had searched his records to determine whether any existed. (Hill, Tr. 1830.) Hill said a bank would insist on prospective borrowers having twice the equity over liabilities. (Hill, Tr. 1832.)[6]

22. The Elf limited partnership agreement was executed by the three partners on October 23, 1985. (Elf Exh. 1.) It was written by Puglia. Each limited partner was to contribute $5,000 in capital, with additional contributions to be made as agreed by *all* the partners. The division of profits was specified as 20% for Elfstrom and 40% each for Betty and Puglia. Losses were similarly attributed. The limited partners are not personally liable for partnership debt or losses beyond the $5,000 contribution. A limited partner also has the power to withdraw on six months' notice all of his paid-in capital. The three partners testified that the agreed contributions, orally, were to be the *pro rata* contributions to the estimated costs for construction, operations (3 months) and application prosecution. (Elfstrom, Tr. 1637-38; Betty, Tr. 1770-72; Puglia, Tr. 1812-16.) From the plain language of the agreement, the parties intended to be bound by capital contributions as orally agreed to by all of the partners. Usually, that would be done by a written call for payment after the partners met and decided how much was needed at a given point in time. KBL's partnership agreement has a similar provision. (KBL Exh. 1, Att. at §7.1.) There is no basis to reject the testimony of the three partners on what they intended to agree to. However, Betty and/or Puglia would control the amount of additional capital contributions after the initial $5,000. Also, the partnership agreement provides that the partners may at anytime withdraw their contributions on six months' notice. (Elf Exh. 1, Para. 22.) That provision nullifies any oral commitment of Betty and Puglia to provide funding and it was unreasonable for Elfstrom to certify to Elf's financial ability based on such oral commitments when the written language of the agreement empowers the limited partners to control additional capital needs and to later rescind those same commitments.

23. Consideration has been given to the question raised by KBL of whether Elfstrom was relying on this association with Hill and Hill's banking connections and that Elfstrom flipped to a concocted story that the limited partners would provide the funding. The conclusion gleaned from Hill's testimony is that the Elfstrom-Hill golfing conversation took place before the October 10 meeting when Elfstrom was making preliminary inquiry of Hill. But it is found that the Hill possibility was not a consideration because by the time that Elfstrom agreed to join Betty and Puglia, Elfstrom was convinced, albeit without sufficient evidence, that he had two wealthly limited partners who would provide 80% of the funding. Aside from the failure to pin down a reasonable assurance with documentation and the agreement to permit the limited partners to withdraw contributions, Elfstrom was acting reasonably in not pursuing Hill between October 10 and October 30, 1985, in view of the short amount of

time to complete and file Elf's application and particularly in view of the fact that the Valley Bank was not then in operation. The greater problem is Elfstrom's certification when he should have known that he did not have the necessary reasonable assurance.

PRELIMINARY CONCLUSIONS

24. The standard set by the Commission for a financial certification in Form 301 (April 1985) provides with respect to an applicant that:

> (a) it has a reasonable assurance of a present firm intention for each agreement to furnish capital or purchase capital stock by parties to the application, each loan by banks, financial institutions or others, and each purchase of equipment on credit;
>
> (b) it can and will meet all contractual requirements as to collateral, guarantees, and capital investment;
>
> (c) it has determined that a reasonable assurance exists that all such sources (excluding banks, financial institutions, and equipment manufacturers have sufficient net liquid assets to meet these commitments.

The Commission has recently addressed the issue of what information and documentary evidence is required for a certifying party to have a reasonable assurance where limited partners are relied on as the funding source. In *Northampton Media Associates*, 4 F.C.C. Rcd 5517 (Comm'n 1989), the Commission held that under certain circumstances documentation of financial ability of principals is not required. In that case, all three principals had read the above-quoted certification language before the voting shareholder signed. Then, it was only after a "thorough review of their personal resources" that Reid, the 20% shareholder, concluded there was a reasonable assurance. In addition, the two shareholders who held 80% were long-time personal friends of Reid and in that case only $39,000 was needed. *Id.* at 5518. The Commission specifically noted that the two 80% shareholders took "an active role in preparing and reviewing the accuracy of the application (including the certification of financial qualifications) before it was filed [and] effectively ratified the certification." *Id.* In that case, Mr. Reid had not obtained financial documentation and the Commission found, as had the trial judge and the Review Board, that under those narrow circumstances documentation was not needed.

25. The facts in *Northampton*, as distinguished from the facts here, establish that all three principals acted jointly throughout the certification process but that only one of those principals actually signed the certification. But here the entire process was left up to Elfstrom. Elfstrom was brought into the process by Betty, a stranger, with only 20 days left before the filing deadline and so he did not have sufficient time to prepare a detailed cost estimate. In fact, Elfstrom and Betty disagreed on the amount of funding needed by over $100,000. In holding the importance of a cost estimate, the Commission has held:

> In order to prove reasonable assurance of financial qualifications at the time of certification, the applicant must adduce probative evidence that, prior to certification, it engaged in serious and reasonable efforts to ascertain predictable construction costs.

Northampton, supra at 5519. In that case, Reid had hired an engineering consultant and together they reviewed costs and prepared an estimate. *See* Review Board decision in *Northampton*, 3 F.C.C. Rcd 5164, 5165 (Review Bd 1988). There the engineer detailed the equipment needed and made available used equipment that he owned in order to keep the costs as low as possible. *Id.* The estimate was done specifically for the station in issue. Reid (the 20% shareholder) was experienced in the broadcasting business and he had worked on the application for a successful radio Station WNYQ in Rotterdam, N.Y. The Rotterdam financial plan was used by all three principals only as a model for estimating expenses at Northampton. There the evidence established a methodical analysis of cost estimating where the principals worked diligently with a retained engineer to keep the costs down to the bare minimum. As an assisting point of reference and guide, they also considered related expenses in an unrelated plan that Reid had worked on.

26. In this case, however, Elfstrom had no time to work out a detailed cost estimate for Killington and Betty and Puglia had no interest in becoming involved in the process. So as an available shortcut, Elfstrom relied entirely on an unrelated cost estimate for an AM radio station. In the process, Elfstrom merely had "discussions" with a radio engineer at radio Station WJJY in Concord, NH but only to the extent of considering the AM Lebanon cost estimates. The engineer was not retained to assist Elf and there is no evidence to show how detailed were the discussions. If applicants are freely permitted to use unrelated data as proxy cost estimates, the system of requiring a reasonable assurance would be frustrated. Also, the estimate that Elfstrom arrived at was considerably less than the $340,000 to $500,000 range estimated by Betty. The variance in estimates shows the lack of coordination among the three partners in addressing a critical stage of the financial certification process, as contrasted with the methodical intense analyses applied to the issue by the three principals in *Northampton*.

27. Also, there was a failure on the part of all principals to inform themselves of their respective home net equities and unsecured bank and securities accounts. Here it is noted that the lack of the key information applied to Betty and Puglia *vis a vis* Elfstrom as well as Elfstrom *vis a vis* Betty and Puglia. Nor is the evidence clear on how much Betty and Puglia knew about each other's actual assets. While under the holding in *Northampton* it was not necessary for Elfstrom to have documented the partner's net assets before certifying, it is still required that Elfstrom "actually had a reasonable assurance of adequate funds at the time of certification." *Id.* at 5519. It is found under these facts and circumstances that Elfstrom, acting as agent for Elf, did not have the required reasonable assurance of the partnership's financial ability to construct and operate for three months at the time of certification. Knowledge of specific dollar amounts of the net equities available, at least to the extent of carefully calculated estimates, is of particular importance where home equities are used for ascertaining reasonable assurance. *See Opal Chadwell* (MM Dkt. No. 85-269), Comm'n *Order*

FCC 88I-045, released May 5, 1988 (relevant appraisal of real property required where applicants rely on non-liquid assets such as home equities). *See also Opal Chadwell*, 4 F.C.C. Rcd 1215, 1216-17 (Comm'n 1989). Thus, Elf has failed to establish its burden of proof on its financial ability at certification.

28. The related issue of misrepresentation or lack of candor hinges on whether there was an agreement among the partners to share *pro rata* in the expenses. The burden of proof is on Elf to show by a preponderance of the evidence that such an agreement had been reached among the partners. *See TeleStar, Inc.*, 2 F.C.C. Rcd 7352-53 (Comm'n 1987). The testimony of Betty, Puglia and Elfstrom is rejected because it is in conflict with the partnership agreement that was prepared by Puglia after the October 10 meeting. (Elf Exh. 1.) While there was language in writing that the partners "may make additional contributions" beyond the specified $5,000, that language is precatory, not absolute, and was drafted after the partners had met. Therefore, it is found that Elf has failed to meet its burden of showing that there was an oral agreement for a *pro rata* capital contribution based on any specific amount of money. That finding is further corroborated by the specific language in the agreement that allows partners to "demand the return of his capital contribution" on six months' notice which is not adequately explained by Elf in the fact of its assertion that there was an unqualified commitment to share *pro rata*. Further evidence of an uncertain commitment from Betty and Puglia beyond the agreed $5,000 is found in the oral conversation on the golf course between Elfstrom and Hill. While Elfstrom was not able to obtain a commitment from Hill, Elfstrom was seeking to find a financial institution to back up Elf's representation to the Commission that Elf was financially qualified. Elfstrom would not need to go to such lengths if he was satisfied that Betty and Puglia had agreed to meet 80% of the needed financing and that they had liquid funds available for that purpose.

29. A *misrepresentation* involves false statements of fact while a *lack of candor* involves concealment, evasion, and other failures to be fully informative. But both delicts represent deceit. *Fox River Broadcasting, Inc.*, 93 F.C.C. 2d 127, 129 (Comm'n 1983). The Commission's stated concern with misrepresentation and lack of candor "stems from the necessity of relying on licensees' representations to the Commission." *Id.* at 130. Here Elf certified to the Commission its reasonable assurance of financing when the partners had failed to disclose essential facts of their net worths. By certifying, Elfstrom was at best being evasive because he knew that the partnership agreement limited each partner to a capital contribution of $5,000, there was no contractual obligation to put up any more than $5,000 and even that amount could be withdrawn by any partner for any reason on six months' notice. The deceptive intent is further found in the circumstances of the Elfstrom-Hill conversation on the golf course which supports the finding that Elfstrom was not relying on any oral promises of Betty and Puglia for 80% of the needed funds and therefore he planned to look to Hill for after-the-fact funding if Elf received the award. The desire, intention or motive to deceive is self-evident. *See Mobilfone Communications*, 95 F.C.C. 2d 668, 680 n. 10 (Review Bd 1983). The partners got together for the first time just 20 days before the filing window would close. Betty and Puglia convinced Elfstrom that they were wealthy individuals from all outward appearances and they, in turn, thought that Elfstrom would be able to come up with 20% of Elfstrom's "estimated" $220,000. Elfstrom relied on Hill as a fall-back option if he was wrong in his assessment of Betty's and Puglia's net worth. (*See* Elf's PFC Phase II at 3 and n.) [1] But the partners did not take the time to ascertain a reasonable assurance and under pressures of time, Elfstrom certified the Form 301 without exercising any further due diligence. The motive was the meeting of the filing deadline with a fully certified application form regardless of whether there was any reasonable assurance. Thus, the elements of deceptive intent and motive to deceive are found by the presiding judge against Elf. *Compare WEBR, Inc.* v. *F. C. C.*, 420 F.2d 158, 162-65 (D.C. Cir. 1969) (inferences may be drawn by trier of fact against applicant when there are inconsistencies in witness' attempt to explain beliefs). Therefore, it is concluded that the applicant is not qualified to hold a Commission license.

30. Since Elf is found to be disqualified for misrepresenting its financial certification, there is no need to consider its application on a comparative basis. But in the event that a reviewing authority reverses that finding and conclusion, consideration will be given below to Elf's current financial qualifications and its comparative case *vis a vis* the other applicants.

Standard Comparative Issue

31. Since the applications of the five applicants are mutually exclusive, a consolidated factual hearing was conducted on all issues wherein the parties presented evidence and conducted cross-examination. *Ashbacker Radio Corp.* v. *F. C. C.*, 325 U.S. 327, 333 (1945).

Media Diversification

32. *Gary* (sole proprietor). Neither Mr. Gary nor his spouse owns any interest in any other medium of mass communication. (Gary Exh. 1.)

33. *KBL* (limited partnership). KBL's sole general partner, Daniel W. Ewald ("Ewald") does not own an interest in any other medium of mass communication. (KBL Exh. 1.) Similarly, KBL's sole limited partner, Walter J. Sczuldo ("Sczuldo") has no media interest. (*Id.*) Nor is there any spousal attribution.

34. *MBLP* (limited partnership). MBLP's sole general partner, Judith E. Leech ("Leech"), does not own an interest in any other medium of mass communications. (MBLP Exh. 4.) Leech is vice-president of Pine Tree Broadcasting Company ("Pine Tree") which is licensee of Station WVNR, Poultney, Vermont. She also is general manager of Station WVNR. Ms. Leech has made a timely commitment to leave her position with Pine Tree and Station WVNR should MBLP receive the grant. (*Id.*)

35. *Elf* (limited partnership). Elf's sole general partner, Mr. Elfstrom, does not own any interest in any other medium of mass communications. (Elf Exh. 1.) However, he failed to timely commit to leave his employment as sales manager at Station WNNE-TV, Hartford, Vermont.

36. *KL* (corporation). KL does not propose to integrate. KL operates LPTV Station W18AE, at Killington, Vermont under a Special Temporary Authority. (KL Exh. 2.) KL also holds construction permits for two new LPTV stations that will serve Killington, Vermont on Channel 35 and on Channel 44 (Official Notice taken of FCC File

Nos. BPTTL-821130TY and BPTTL-821130TX). (KL Exh. 2.) KL has also applied for a new LPTV station to serve Killington on Channel 47. (KL Exh. 2.)

Auxiliary Power

37. Each of the five competing applicants proposes to install auxiliary power generating equipment at the respective transmitter and main studio sites. (Gary Exh. 1.) (KBL Exh. 1.) (MBLP Exh. 1.) (Elf Exh. 4.) (KL Exh. 3.)

Comparative Coverage

38. Under the comparative issues set in the *HDO supra*, the applicant parties were required to submit comparative coverage evidence in a joint exhibit in order for the presiding judge to consider the areas and populations which would receive FM service of 1 mV/m or greater intensity, and the availability of other primary aural services in those areas, to determine ultimately whether any of the applicants should receive a preference. A joint engineering exhibit was submitted and received into evidence on March 6, 1989. (Jt. Exh. No. 1; Tr. 30-31.)

39. The following table lists the total areas and populations within the applicants' 1 mV/m contour. It includes data for all of the original specified sites, as well as for the sites presently proposed by KBL and MBLP, whose applications were amended.

Total Areas And Populations

Applicant	Area (sq. km)	Population
Gary	8,503	184,491
KBL (Original)	7,423	172,150
KBL (Amended)	8,503	184,491
MBLP (Original)	8,260	181,927
MBLP (Amended)	8,260	181,927
Elf	8,503	184,491
KL	8,057	178,880

40. The following area and population data demonstrates the availability of other services in the daytime.

Daytime Aural Services

Existing Services To Total Area

Applicant	Area (sq. km.) 5 or more	4	3	2	1
Gary	1,800	251	88	6	0
KBL (Original)	6,894	429	100	0	0
KBL (Amended)	8,158	251	88	6	0
MBLP (Original)	7,956	211	90	3	0
MBLP (Amended)	7,956	211	90	3	0
Elf	8,158	251	88	6	0
KL	7,809	170	78	0	0
Applicant	**Population 5 or more**	**4**	**3**	**2**	**1**
Gary	176,511	4,494	3,464	22	0
KBL (Original)	168,883	3,047	220	0	0
KBL (Amended)	176,511	4,494	3,464	22	0
MBLP (Original)	174,366	4,086	3,464	11	0
MBLP (Amended)	174,366	4,086	3,464	11	0
Elf	176,511	4,494	3,464	22	0
KL	1173,239	3,505	2,125	11	0

41. The following table demonstrates the availability of other services at night.

Nighttime Aural Services
Existing Services To Total Area

Applicant	Area (sq. km.) 5 or more	4	3	2	1
Gary	5,079	2,544	829	51	0
KBL (Original)	6,125	936	264	83	15
KBL (Amended)	5,079	2,544	829	51	0
MBLP (Original)	4,944	2,471	797	48	0
MBLP (Amended)	4,944	2,471	797	48	0
Elf	5,079	2,544	829	51	0
KL	4,836	2,405	771	45	0
Applicant	**Population 5 or more**	**4**	**3**	**2**	**1**
Gary	149,297	27,642	7,524	28	0
KBL (Original)	141,889	22,095	7,059	1,107	0
KBL (Amended)	149,297	27,642	7,524	28	0
MBLP (Original)	147,051	27,324	7,524	28	0
MBLP (Amended)	147,051	27,324	7,524	28	0
Elf	149,297	27,642	7,524	28	0
KL	146,406	26,340	6,134	0	0

Integration Proposals

Gary

42. Gary is an individual applicant. He proposes to serve as general manager on a full-time basis (at least 40 hours per week). In that capacity, Gary would oversee the day-to-day station operations and he will be responsible for formulating all station policies. (Gary Exh. 1, p. 1.)

43. But there is evidence which raises a serious question of whether Gary will follow through on his integration proposal. Gary has only once made the 4 to 6 hour drive to Killington. Although he has committed to move to Killington, Gary has significant family and business ties with Hartford where he resides with his wife and five year old son. (Gary, Tr. 126-28, 132.) Gary has lived in the Hartford, Connecticut area since 1969. (Gary, Tr. 128.) His wife, who is a lawyer, has lived in the Hartford area for virtually her whole lifetime. (Gary, Tr. 192-93.) There is no evidence in the record of her membership in the Vermont bar.

44. Gary also has a business in Hartford. He is full owner of AEG Design Build, Inc. ("AEG") a real estate development firm that does no business in Vermont. (Gary, Tr. 130-31.) He is engaged through AEG in planning and land development. (Gary, Tr. 188.) Much of his business time is spent in bidding on contracts with the City of Hartford and he currently works a forty hour week. (Gary, Tr. 138, 142.) About 30 to 40 percent of his hours are spent in the office while the remainder of his time is spent on business development meetings. (Gary, Tr. 142.) Gary admits that AEG was established through

his reputation. (Gary, Tr. 153.) Gary does not propose to sell his interest in AEG. Rather, if he is declared the winner, he plans to keep the business as owner but lessen his participation to that of supervision through his attendance at one staff meeting per month. (Gary Exh. 1; Tr. 132-33, 142.) Gary also will remain in touch with AEG's offices through telephone calls not to exceed three hours per week. (Gary, Exh. 1, pp. 1-2.) Gary testified that he has trained an employee of AEG who has been with AEG for four years and who will take over Gary's duties. (Gary, Tr. 155-57.) Gary has discussed his plans with the employee. (Gary, Tr. 191.)

45. Gary would qualify for a preference because of his race (Afro American), assuming that his integration proposal were accepted. Gary admits to having no civic involvement in the proposed service area. (Gary Exh. 1.) For reasons stated at Para. 97 below, Gary's proposal is not accepted because he has not met his burden of showing that he would leave his business in Hartford.

KBL

46. KBL is a limited partnership organized under the laws of Vermont. Ewald is sole general partner with a 20% equity position. Sczuldo is the sole limited partner with an 80% equity position. (KBL Exh. 1.)

47. KBL had its gensis through the workings of an outside free agent, Mr. Barry Skidelski ("Skidelski"). Skidelski was a law school classmate of Sczuldo's at Vermont Law School. He phoned Sczuldo to raise the possibility of the latter's interest in investing in a radio venture. (Sczuldo, Tr. 902-03.) Skidelski told Sczuldo that he had an arrangement with Sachs Freeman and Associates ("SFA"), a firm that was offering packaged applications for 80-90 FM radio allocations. (Sczuldo, Tr. 903-04.)[7] Skidelski offered to provide the legal services and SFA would furnish the engineering. (Sczuldo, Tr. 906.) These initial contacts between Skidelski and Sczuldo occurred in the Summer of 1985.

48. Around September-October 1985, apparently realizing that a local general manager would be of benefit to the venture, Skidelski called Ewald and mentioned to him the availability of a frequency for the Killington area. (Sczuldo, Tr. 907.) But according to Ewald, it was at a 1985 Summer reunion of their Vermont Law School that Skidelski told Ewald about the Killington frequency. (Ewald, Tr. 244-45.) In 1985, Ewald was hosting a talk show on the Plymouth, Vermont public access television station. He resided in the Killington area. (KBL Exh. 1.) Also, while employed by the corporate owners of the Killington Ski Area, Ewald researched the steps needed through FCC Rule Making to allocate an FM station to Killington. (KBL Exh. 1 at 7.) Thus, it appears from these series of circumstances that three classmates got together to apply for the Killington station: Skidelski was the initial promoter who hoped to gain legal fees for himself and consulting/engineering fees for SFA with which he was associated. Ewald was a local resident who at the time was practicing law as a sole-practitioner from his home in Plymouth. (KBL Exh. 1.) And Sczuldo, an in-house attorney with Shell Oil in Washington, D.C., was an investor whom Skidelski solicited.

49. There has been a substantial contest between KBL and Elf over whether it was Ewald or Sczuldo who retained SFA, the initial engineering firm for KBL. Elf seeks to portray Sczuldo as a person who was in control of KBL's application which would defeat KBL's 100% integration claim through Ewald.[8] The facts disclose that Sczuldo met in early Fall of 1985 with Skidelski and a principal of SFA, Carl Hurlebus. (Sczuldo, Tr. 912-14.) On October 18, 1985, Sczuldo sent Hurlebus a check for $600 and requested that SFA complete the engineering portion of KBL's application. (Elf Exh. 6; Sczuldo, Tr. 920-21.) At that point, Ewald had not decided whether he would join the venture and a find agreement was not reached until a partnership agreement was signed on October 30, 1985. (Sczuldo, Tr. 921, 954, 961.) Sczuldo went forward with securing SFA's engineering services while these discussions were ongoing, with Sczuldo realizing that it was necessary to file by October 30. (Sczuldo, Tr. 962.) But after the partnership agreement was signed, Ewald took over the relationship between KBL and SFA. Ewald testified that he called SFA once prior to October 29, 1989, wherein he retained SFA. Later, Ewald also called SFA on October 29, 1989, about the firm's work for KBL. (Ewald, Tr. 309.) Ewald testified that the SFA engineering work was completed before October 29, 1989; the date on the engineering portion of Form 301 was October 25, 1985. (Ewald, Tr. 310-11.)

50. The evidence supports the conclusion that Sczuldo effectively had retained SFA on October 18, 1989, when he sent the check for $600. It may have been Skidelski who instructed SFA on what needed to be done and Sczuldo merely sent the check. (*See* Ewald, Tr. 312.) But by the time that Ewald became a partner, SFA had already completed the engineering for the application which had to be filed on October 30, 1989. The participation of Sczuldo was significant but it was a one time only step taken to contact the engineer directly by way of payment because of the imminence of the situation. No doubt, the engineering would not be completed without some payment of a fee and without SFA's assistance at that late date, KBL would have no chance to prosecute its case.

51. In the course of considering the evidence and the arguments in the pleadings, Elf attempted to show that Ewald's testimony was inconsistent. For example, in his deposition, Ewald testified that after Skidelski had spoken with SFA, Ewald called and retained them. (Ewald, Tr. 308.) Later, after reviewing phone records, Ewald concluded that he had called SFA on October 29. (Ewald, Tr. 309.) At that point, Ewald's deposition and hearing testimony were consistent. But then Ewald testified that there must have been an earlier phone call which he initiated to SFA wherein he "made it clear to them [SFA] that they were going to be working on this application with us." (*Id.*) In a somewhat "Keystone Cops" setting, Ewald simply was not aware that Sczuldo was sending the $600 check and Ewald was clearly relying on Skidelski to effectively move SFA to complete the engineering on time:

> Ewald: It was my belief that Barry (Skidelski) had spoken with them [SFA] and Barry had prompted them to begin work on the engineering portion of the application - - -.

* * *

> Ewald: I was not aware of that letter being sent [Elf Exh. 6] and I was not aware of Mr. Sczuldo sending them money at that time. If I was aware, if for some reason somebody told me, I certainly didn't remember it.

(Ewald, Tr. 312.) Here Ewald tries to cover all the bases with his hypothesis that if someone told him the operative facts, he didn't remember. (*Id.*) However, Ewald was not seeking to mislead because, as stated, it was a hypothetical absurdity. Therefore, it added nothing to the basic story that comes through, i.e., the partnership had not yet crystalized and in the meantime, Skidelski and Sczuldo were the moving forces on behalf of KBL in order to effect KBL's proposal before it became too late.[9] Ewald did not have any motive to mislead on his involvement, or lack thereof, because there is no other evidence that Sczuldo was otherwise active in the process. Ultimately, Skidelski was replaced as communications counsel by the firm of Verner, Liipfert, Bernhard, McPherson and Hand. Ewald later fired SFA and hired another engineer whom he also later fired. (Ewald Tr. 323, 351-52.)

52. Thus, it is found that by October 30, 1989, when the application was signed by Ewald, he was in charge of the process. Although Sczuldo, who had other family members who had retained the Verner, Liipfert law firm, recommended the firm, Ewald retained the firm on behalf of KBL. Ewald also fired and hired engineers. (Ewald, Tr. 339-40.) He obtained site and bank letters. The fact that Ewald communicated with Sczuldo on a peripheral SFA payment dispute with Dunn & Bradstreet is *de minimis* and irrelevant to the control by Ewald over the application. Ewald pays the bills and sent statements for legal services to Sczuldo in 1988 and 1989 to support the need for additional capital contributions. There is no adverse inference to be drawn against Ewald's control from the totality of the contacts he had with Sczuldo.

53. Ewald resides in Plymouth, Vermont. (KBL Exh. 1 at 3.) He has resided in Plymouth since 1983, and prior to that he resided in Killington since October 1981. From 1978 to 1979, he resided in Stratford, Vermont. All of these residences are within KBL's service contours. (*Id.*) He is an attorney who now practices from his home in Plymouth. Ewald is not on retainer with any client, he has not taken any case on a contingency, and he has no case in litigation. As of the hearing he was working on five real estate transactions as the closing attorney. (KBL Exh. 1 at 8.) He is also involved in local real estate ventures. (*Id.*)

54. Since 1978, Ewald was a member of the Plymouth Volunteer Fire Department. He has fought fires regularly and attends bi-monthly meetings, drills and training sessions. He also has participated in related fundraising. (KBL Exh. 1 at 4.) Since 1986, Ewald has served on the Town Planning Commission which reviews developers' proposed site plans for conformity with local zoning ordinances (twelve meetings yearly totalling 50 hours). (*Id.* at 4-5.) Ewald also served on a subcommittee that revised the town plan and has other proposals under consideration. (*Id.*) Ewald is the appointed Selectman of Plymouth. He also serves on the panel for appeals from rejected zoning variance applicants. In 1988, he represented Plymouth on a twenty-two town regional planning commission. Later that year he was named chair of the committee and he reviewed zoning and subdivision ordinances for the 22 participating towns. In 1985, he moderated a panel in Plymouth that considered a school closing.[10]

55. Ewald has some relevant broadcasting experience. In 1983, he served as news reporter for Station WNHV in New Hampshire. (KBL Exh. 1 at 7.) From 1984 to 1985, he hosted a television talk show program that was broadcasted in Plymouth. During 1985-86, Ewald was employed as associate producer for coverage of a significant ski event during the Winter Olympic Games in Colorado. (*Id.*)

56. KBL proposes no credit for a minority or a female preference.

MBLP

57. MBLP is organized as a limited partnership under the laws of Vermont pursuant to an agreement entered into on September 29, 1989. (MBLP Exh. 1.) Under that structure, Ms. Leech is the sole general partner with a 20% equity interest. Dominion Broadcasting Company ("DBC") is the sole limited partner and owns the remaining 80% of the venture's equity. (*Id.*)

58. Under the express terms of the limited partnership agreement, Leech has the sole and exclusive power and authority to control and operate the station. (MBLP Exh. 1 at Att.) DBC, and its principals, have no authority under the agreement to participate in the control or in the management of the business of MBLP. (*Id.* at 17.) The principals of DBC are experienced broadcasters, Joseph H. Bourdow ("Bourdow") and Albert C. Schmick ("Schmick").[11]

59. However, MBLP did not originate in the structure outlined above. Because of Bourdow's activities in preparing cost estimates and making loans to Leech, he was ordered to present himself for cross-examination. *See Order*, FCC 89M-712, released March 6, 1989. The evidence discloses that in April 1985, Ms. Leech's brother, Michael Leech, advised her that he was seeking to buy a station and asked her interest in serving as its manager. Ms. Leech was then without work and had been unemployed for a considerable period of time. (Leech, Tr. 479-85.) She said she was interested. Thereafter, Michael Leech agreed in October 1985 to purchase Station WVNR at Poultney, Vermont. (Leech, Tr. 491.) A formal contract to purchase the station was entered into by Michael in December 1985. (Leech, Tr. 491-92.)

60. Michael Leech's interest in acquiring a radio station extended to the Killington FM allocation. In October 1985, Michael met with Bourdow and Ms. Leech to discuss filing for the Killington station. (Leech, Tr. 497-98, 1021.) Michael Leech had a long-term relationship with Bourdow. They were roommates in college and Bourdow was bestman at Michael's wedding. (Leech, Tr. 619.) In late 1984, Michael Leech had consulted Bourdow on acquiring a New England radio station and specifically on his interest in acquiring Station WVNR. (Leech, Tr. 1016-17.) In July 1985, Bourdow, Judith and Michael Leech toured the Poultney station. (Leech, Tr. 1018.) Judith received no equity interest in Station WVNR and she did not have sufficient funds to purchase an interest. (Leech, Tr. 491.) In contrast, Judith initially received a 70% equity interest in the Killington venture. (Leech, Tr.

493.) However, Leech could give no reason on cross-examination why she received a 70% equity interest in one but not in the other. (Leech, Tr. 495.)

61. One week before the application was filed (at that time the applicant was called Killington Mountain Broadcasting Company) there was a conference telephone call participated in by Michael and Judith Leech and Bourdow in which all agreed to go forward. Bourdow's business associate, Mr. Schmick, joined the group along with Michael's wife, Barbara Leech. The ownership structure was as follows: (MBLP Exh. 1, pp. 1-2.)

Name	Title	Ownership Interest
Judith Leech	President/Director	70%
Michael Leech	Director	7.5%
Barbara Leech	Secretary/Treasurer/	7.5%
Dominion Marketing Inc.		15%
Bourdow	Vice President/Director	
Schmick	Director	

As of October 30, 1985, Dominion Marketing, Inc. ("DMI"),[12] was owned by Bourdow and Schmick and at no time subsequent to that date did Bourdow and Schmick maintain less than a controlling interest in DMI. (MBLP Exh. 1, p. 2; MBLP Exh. 7; Bourdow, Tr. 1030.)

62. By pre-designation amendment on January 29, 1986, the applicant changed its name to Mountain Broadcasting Company. Thereafter, by predesignation amendment of September 30, 1987, the structure was changed to that of limited partnership as MBLP. On September 30, 1987, MBLP's ownership structure was reflected as follows:

Name	Type of Interest	Percentage Interest
Judith Leech	General Partner	100% Voting 20% Equity
Michael Leech	Limited Partner	20% Equity
Barbara Leech	Limited Partner	20% Equity
Dominion Marketing Inc.	Limited Partner	40% Equity

(MBLP Exh. 1 at 2-3.) Thus, the equity interest of Judith dropped from 70% to 20% and Barbara was dropped entirely. These shifts in equitable control indicate a structural uncertainty that Judith could not control and did not fully understand when her testimony is considered in that context. (Leech, Tr. 505.) It is probative of her lack of control that her equity interest should drop from 70% to 20% and there is no evidence that she was compensated or even meaningfully consulted.

63. There is further evidence that Ms. Leech did not control the prosecution of the application. It was Michael Leech who hired communications counsel. (Leech, Tr. 498.) It was also Michael Leech who obtained reasonable assurance of the transmitter site. (Leech, Tr. 622.) Judith checked on the cost of studio space, but otherwise it was Michael who prepared the budget for the required cost estimate. (Leech, Tr. 525.) On cross-examination, Judith Leech's unawareness of the equity allocations was illustrated:

> Q. [W]as there any bargaining over this allocation of the equity?
>
> A. You mean did we sit there and debate back and forth who would have what?
>
> Q. Yes M'am.
>
> A. Not to my knowledge. Not to my recollection.
>
> Q. And whose idea was it that you would have the seventy shares?
>
> A. I'm not sure.

(Leech, Tr. 505.) And when she was asked about the considerable reduction of her equity interest from 70% to 20% she replied: "Well, we did not really negotiate. It just - it ended up that way. It just - for whatever reason." (Leech, Tr. 528.)

64. Ms. Leech understood that she would only be required to pay One Dollar per share for her 70% interest. She did not make any payment until August 1988 and those payments were made after Bourdow lent her money. (Leech, Tr. 556, 560.) Bills were not presented to Ms. Leech. (Leech, Tr. 511-13.) Michael was to take care of the expenses for which he later would be reimbursed. (Leech, Tr. 516.) There were no financial statements provided by Messrs. Bourdow and Schmick for Ms. Leech to consider before she certified to MBLP's financial ability, and it appears that she was only doing her brother's bidding. There is further evidence of that conclusion noted below.

65. While the MBLP application was pending, Michael Leech, his wife Barbara and his sister Judith were involved in an FM application for Whitehall, New York, a community located only 25 miles from Killington. (Leech, Tr. 539-41.) Michael took the lead and Judith was given a 5% equity interest at no cost. (Leech, Tr. 541.) Ms. Leech ultimately gave up her interest in Whitehall, for which she was paid nothing, in favor of her brother and sister-in-law. (Leech, Tr. 543, 545.) Still, Judith Leech thereafter assisted her brother in the Whitehall project by locating property owners, contacting a tower construction firm and contacting equipment vendors. (Leech, Tr. 596-97, 608.) Clearly, Judith is working on assignment from her brother, a conclusion that is consistent with Judith's unemployment status.

66. If MBLP's proposal is accepted, Ms. Leech is proposed for integration as station manager at which she will work 40 hours per week. (MBLP Exh. 2.) She will oversee all station departments, establish major station policies, and supervise day-to-day operations. In order to carry out her position at the station, Leech will leave her current employment as general manager at Station WVNR. (MBLP Exh. 2; MBLP Exh. 3 at 3.)

67. Ms. Leech is a Caucasian female. Since February 1986, she resided in Fair Haven, Vermont, within MBLP's proposed service area. In 1971, she graduated form the State University of New York where she received a Bachelor of Science degree. She attended the University of Minnesota full- time from 1975 to 1977 and Trenton Station University part-time in 1978. She also attended Mercer County Community College full-time from 1981 until 1983, where she received a degree in computer science. (MBLP Exh. 3, at 1; Leech, Tr. 479-81, 484.)

68. Ms. Leech has been involved in community organizations and activities. She has been a member of the Fair Haven Chamber of Commerce since 1986. She also has been a member of the Poultney Chamber of Commerce since 1986. She has been a member of the Women's Auxiliary of the Eagles since the Spring of 1988. Beginning in 1986, she was involved in numerous

projects that the Eagles sponsored. She also has been a member of the Vermont Association of Broadcasters since 1986. (MBLP Exh. 3 at 1-2.)

69. MBLP seeks qualitative credit for Ms. Leech's contacts with various community groups in connection with her position as general manager of Station WVNR at Poultney, Vermont. (MBLP PFC at 8-9.) However, such civic contacts and relations are required in order to address the community broadcast coverage policies of that station and they will not be recognized as personal qualitative attributes of Ms. Leech in this case.

70. Ms. Leech also claims credit for her broadcast experience at Station WVNR where she has served as general manager since 1986. (MBLP Exh. 3 at 3.) There she works 60 to 70 hours per week and supervises a staff of 19 employees. (*Id.*) She will terminate her position at WVNR should MBLP receive the grant in this case. (*Id.*) Elf contends that Michael Leech set up his sister at Station WVNR in order to qualify her for broadcast experience. (*See* Elf RPFC at 22.) While there is not sufficient evidence in the record to make the adverse finding that Elf seeks, in view of Michael's control, Judith will not be credited with the broadcast experience of a station manager. It is also noted that Station WVNR was obtained by Michael Leech without the participation of Judith, and she has never had an equity interest in that station. Therefore, MBLP has not shown sufficient evidence to establish that control of Station WVNR was ever turned over to Judith Leech who had no prior broadcast experience.

71. MBLP offers additional relevant evidence on Ms. Leech's participation in the Killington proposal with respect to her cash investments and her control over the disposition of funds. Specifically, by the time this case went to hearing in March 1989, MBLP asserts that Leech had paid in capital in the amount of $15,000. (MBLP PFC at 9.) But the fact of her payment was not communicated to Bourdow until the week before he testified in this case. (Bourdow, Tr. 1082-83.) Under the partnership agreement that was executed on September 29, 1987, Judith Leech was required to make an initial capital contribution in the amount of only $500. (MBLP Exh. 1 at Att. §2.01 and Schedule A.) The agreement provided that such payment was to be made within ten days of the agreement. (*Id.* §2.01(a).) Thereafter, each partner (including the general partner) must contribute additional capital thirty days after the general partner sends out a call for more capital. (*Id.* at §2.01(b).) Ms. Leech did not make her initial $500 payment until August 1988, after she was loaned the funds by Bourdow. (Leech, Tr. 556-57, 560-62.) Ms. Leech testified that she had an open-ended understanding with Bourdow to borrow more funds as needed. (Leech, Tr. 561.) Since MBLP offered no evidence of where she obtained her funding, it will be presumed that Bourdow loaned her the money. The reliance that Ms. Leech has placed on Bourdow's willingness to loan her money so that she can meet her financial obligations under the agreement is an additional factor to support a finding that Ms. Leech lacks independence and control over the prosecution of MBLP's application.

Elf

72. Elf is a limited partnership organized under the laws of New York State. (Elf Exh. 1 at 1.) Elfstrom is sole general partner. Hugo and Puglia are the only limited partners. The partnership was formed in October 1985 under the name of "Green Mountain Broadcasting Co." But Elfstrom later discovered that name was registered locally and so the partnership name was changed to Elf. (*Id.*)[13]

73. Elfstrom was born in 1953 in Cherry Point, North Carolina, where his father, who was then in the U.S. Navy, was stationed. (Elf Exh. 2 at 1.) In 1977, he moved to Lebanon, New Hampshire, and he has resided there since that time. (*Id.*) Lebanon is within the 1 mV/m service area of Elf's proposed station. Elfstrom presently resides in Lebanon but he has committed to relocate to Killington. (*Id.*)

74. Elfstrom will serve as full-time general manager of the proposed station. (*Id.*) He is currently the general manager at Station WNNE-TV, Hartford, Vermont, a community which is within the proposed FM station's 1 mV/m service area. (*Id.* at 1-2.) Elfstrom has committed to terminate that employment and sever all connections should Elf receive the grant. (*Id.* at 2.)

75. As general manager, Elfstrom will oversee the station's construction and operations. (*Id.*) He will have full responsibility and authority for all decisions including long-range policy and significant financial matters. (*Id.*) Also, all aspects of the station's operations will be under his supervision, including the programming, staffing and sales. (*Id.*) He also will be responsible for the equal employment opportunity practices of the station. (*Id.*)

76. Elfstrom has acquired broadcast experience since 1980 through different positions at various broadcast stations. (*Id.*) His first experience was in 1980 as salesman for Station WTSL(AM) in Lebanon, New Hampshire. (*Id.*) He left in September, 1982 to take a sales position at Station WNNE-TV. (*Id.*) In 1984, Elfstrom was promoted to national sales manager and he assumed responsibility for all contacts between the station and agencies representing major national and regional accounts. (*Id.*) His duties as sales manager gradually increased to involvement in most policy discussions involving station management. (*Id.* at 3.) In September 1988, he was promoted to the position of general manager at WNNE-TV. (*Id.*) Elfstrom is now responsible for overseeing the total operation of WNNE-TV, which currently has approximately 50 part-time and full-time employees. (*Id.*)

77. Elfstrom attended Babson College in Wellesley, Massachusetts. He graduated in December, 1975, with a Bachelor of Science degree in Business Administration. (*Id.*) In January of 1976, he worked as bar manager at the American Legion Post in White River Junction, Vermont, which is within the proposed station's service area. (*Id.*) for approximately six months. (*Id.*) Then he moved to Washington, D.C., where he took a six-month job in sales for Rollins Security Systems. (*Id.*) He moved back to Lebanon, New Hampshire in the summer of 1977 where he went to work for American Finance as a manager trainee. (*Id.*) In 1978, he became a branch manager and continued in that position until he left in 1979 to start Elf Surety Systems in Lebanon. (*Id.*) He ran his business for approximately one year. Then he sold the accounts. (*Id.* at 3-4.) He began work for WTSL(AM) in the summer of 1980. (*Id.* at 4.)

78. Elfstrom is of American Indian heritage through his mother, Cloma Marie Elfstrom. Both parents of his mother were full-blooded American Indians. (*Id.*) His grandmother was a full-blooded Otoe and his grandfather was a full-blooded Shawnee. (*Id.* at 4, Attachments A and B; *see also* Elf Exh. 3 at 1, Attachments A and B.) Elfstrom testified that he is proud of his American Indian heritage,

and that he has always identified himself and held himself out as an American Indian in the community. (Elf Exh. 2 at 4-5.) Elfstrom's family took several trips to Red Rock, Oklahoma, where the Otoe reservation is located, to visit relatives. (Elf Exh. 2 at 5.) Also, the Elfstroms have taught their children about their American Indian heritage and they participate in Indian pow-wows. (Elf Exh. 2 at 5.)

79. Elfstrom participated in civic activities within the relevant service area. (Elf Exh. 2.) He was a member of the Lebanon Area Jaycees from 1977 to 1985. (*Id.*) He has served in various capacities, including president (1981), vice-president (1980), and secretary (1979). (*Id.*) He received miscellaneous honors and commendations for his work for the Jaycees. Since the summer of 1985, Elfstrom has been a member of the Hanover, New Hampshire Lions Club. (*Id.* at 6.) As a director, he attended directors' meetings and discussed prospective recipients of the Club's funds which had been raised for such medical needs as glasses and wheelchairs. (*Id.*)

80. As further evidence of his civic activities, Elfstrom notes his school involvement. He has served on the promotion and playground committee for the Lebanon Pre-School and he worked towards obtaining the Pre-School's new playground equipment; he personally devoted approximately 80 hours to this project. (*Id.*) In addition, Elfstrom serves on the Board of Overseers for Alice Peck-Day Hospital in Lebanon, New Hampshire. (*Id.*) He served on this Board, which is responsible for reviewing and approving reports of the hospital management and staff, for approximately four years. (*Id.* at 7-8.) He also was involved in a promotion-awareness program for David's House in Hanover, New Hampshire, which is a hostel for family members of children who are hospitalized at the Dartmouth Hitchcock Medical Facility in Hanover. (*Id.* at 8.)

81. Elf has shown substantial civic involvement for Mr. Elfstrom. But there are two categories which have been rejected. Elf will not be credited with the promotional work that Elfstrom performed in connection with his employment at Station WNNE-TV. Such activities, although highly commendable, are related to his employment and carry a mixed motive of creating good will for the station in the community. Also, Station WNNE-TV had an existing obligation to learn of community affairs so that its programming would be relevant. Those activities related to the broadcast business will not be awarded a qualitative credit for Elf in this comparative proceeding.

82. Elf also has proposed evidence of Elfstrom's church involvement as an attendee with his family. (Elf PFC at 9.) But that evidence is directly related to religious observance and therefore will not be considered. *See Newton TV Limited*, 3 F.C.C. Rcd at 555-56 (Review Bd 1988) (only civic involvement that is ancillary to church activities will receive credit). Similarly, Elfstrom's work in constructing a Christmas Nativity scene may not be credited in this proceeding under the Review Board's standard. *Id.*

KL

83. Killington, Ltd. is a Vermont corporation that is wholly owned by S-K-I Ltd. The stockholders, officers and directors of S-K-I Ltd. are as follows:

Name	Percentage	Position
Jose M. Calhoun	0.4	Director
F. Ray Keyser, Jr.	0.1	Director
Walter N. Morris	-	Director
Joseph D. Sargent	11.4	Chairman
Mrs. Joseph D. Sargent	0.8	Director
Preston Lee Smith	12.1	President, Chief Executive Officer and Director
Susanne H. Smith	0.4	Director
Joseph Van Vleck, III	1.9	Vice President and Director
Martel D. Wilson, Jr.	2.8	Vice President and Controller and Director
Foster T. Chandler, Jr.	-	Vice President-Director of Marketing
Leo A. Denis	-	Vice President - Skiing
Robert Fenner	-	Assistant Treasurer, Assistant Controller
Henry B. Lunde	-	Vice President, General Manager
David E. Wilcox	-	Vice President
Carl G. Spangler	-	Vice President-Division Planning

(KL Exh. 1, at 1.) The remainder of S-K-I Ltd. is publicly owned, with no person owning 5% or more of the company. (KL Exh. 1 at 2.)

84. KL does not propose to integrate any of its principals into the stations' management. Therefore, there are no further relevant facts to find with respect to KL's proposal.

CONCLUSIONS OF LAW

85. Section 307(b) of the Communications Act of 1934, as amended, (the Act) requires the "fair, efficient and equitable distribution" of broadcast service. Therefore, an assessment of the evidence must be made under the applicable Commission standard in determining which applicants meet the statutory standard. *See Policy Statement On Comparative Broadcast Hearings*, 1 F.C.C. 2d 393 (1965).

86. The primary concerns under the Act are: (1) maximum diffusion of control of the media of mass communication or diversification and (2) best practicable service to the public. *See West Michigan Broadcasting Co.* v. *F. C. C.*, 735 F.2d 601, 603-607 (D.C. Cir. 1984) (process of comparative evaluation). Thus, comparative credit will be awarded to applicants which are without other media interests. The "best practicable service" standard includes the integration of ownership into management which may be enhanced by local residence, civic activities, broadcast experience and, if applicable, minority and female gender preferences. However, before conducting the comparative analysis, a determination of the basic qualifications of Elf must be made. *Louis Adelman*, 28 F.C.C. 432 (1960), *recon. denied*, 29 F.C.C. 1223 (1960), *aff'd sub nom Guinan et al*, v. *F. C. C.*, 297 F.2d 782 (D.C. Cir. 1961). Also, the *bona fides* of the integration proposal of MBLP and the credibility of Gary's commitment to move to Killington have been challenged and will be considered before comparative conclusions are decided. *Compare N. E. O. Broadcasting Company*, 103 F.C.C. 2d 1031, 1035 (Review Bd 1986) (non-owner found to control 100% owner spouse in all decisions and therefore applicant not credited with integration) and *Washoe Shoshone Broadcasting*, 3 F.C.C. Rcd 3948, 3955 (Review Bd 1988) (affir-

mative showing required to prove that integrated principal can accommodate other substantial business activities). The preponderance of the evidence establishes that the permit must be awarded to KBL.

Elf's Financial Certification

87. The relevant findings are summarized as follows: (*See* Paras. 8 to 23, *supra*.) Elfstrom used cost estimates for an unrelated AM station as the basis for estimating the costs for the FM station at Killington. He informally discussed the estimates with a radio engineer at another station. There was no review of the cost estimates by Elfstrom and the two limited partners before Elfstrom certified Elf's application. There was disagreement between Elfstrom's estimate of $220,000 and limited partner Betty's estimate of from $300,000 to $500,000. Elfstrom and the limited partners met ten days before certification and generally discussed their home equities and bank and securities accounts. Elfstrom was impressed with the affluent descriptions of homes, references to country club membership and a Jaguar automobile. But no financial statements were obtained. Elfstrom relied on the limited partners' undetermined net worths as the basis for Elf's reasonable assurance. The limited partners relied on similar undocumented representations by Elfstrom for his lesser commitment. Elfstrom also relied on a conversation with a banking official as a back-up in which no commitment was made to provide funding. Nonetheless, Elfstrom certified to Elf's reasonable assurance of sufficient funds to construct and operate for three months. Clearly, Elf failed to meet the Commission's standard for reasonable assurance. *See* discussion *supra* at Paras. 24-27. There is also the need to determine whether Elf has misrepresented its financial certification to the Commission or whether Elf was lacking in candor.

88. The Commission has stated what it expects of the character of its applicants:

> As observed previously, the scope of the Commission's character inquiry will now focus on those aspects of an applicant's character that relate to its proclivity for truthfulness in dealing with the Commission and its propensity for complying with our rules and policies.

Character Qualifications, 102 F.C.C. 2d 1179, 1231 (Comm'n 1986). The Commission has rejected character for comparative analysis. *Id*. But at the same time, it took care to retain an inquiry into "character as an element of the licensing process." *Id*. at 1189. Because there is a predictive element to the application process, the Commission "looks for clues as to risks and to evidence as to expectable performance." *Id*. The pivotal traits are those of "truthfulness" and "reliability" which can only be determined through observations of "behavior." *Id*. at 1190. Another related element is the need for taking adverse action against an applicant when "the deterrent effect of our actions helps to ensure future reliability and truthfulness." *Id*. at n. 26. *See also F. C. C.* v. *WOKO*, 329 U.S. 223, 228 (1946). A restriction imposed on the scope of the inquiry is to limit it to "only misconduct relevant to operation of broadcast stations." 102 F.C.C. 2d at 1190.

89. Applying the facts of Elfstrom's actions against those standards, it is concluded that Elf has failed to meet its burden under the added issues to show by a preponderance of the evidence that Elf's financial certification was not a misrepresentation and was not lacking in candor. Elfstrom was negotiating for the position of general partner at the same time as he was discussing financing with Betty and Puglia on October 20. Since a financial institution was not used, all three partners had a duty to clarify the specific net equities that would meet the estimated costs. *See Northampton, supra*. That was never done and the partners never exchanged their balances sheets. Thus, Elfstrom had no reasonable basis for the certification on Form 301. Also, even if the three partners disclosed their respective home net equities, in order to rely on real estate values the partners would need to see relevant appraisals. *See Opal Chadwell, supra*. Elfstrom knew or should have known of these deficiencies. Yet he had a motive and a corresponding intention to make the certification because time was running out and Elf needed to file by October 30, 1985. Elfstrom was made further aware of the lack of a commitment from the limited partners by virtue of the stated limitations of capital obligations to $5,000 each, coupled with a right of withdrawal set forth in the limited partnership agreement that the parties executed on October 23, 1985. Elfstrom's uncertainty of their commitment is further shown by the unsuccessful attempt he made to have Mr. Hill provide a backup bank commitment.

90. Such evidence establishes that Elf failed to meet its burden of proof under the added issues. Because of the press of time, Elf had the motive and intent to misrepresent its financial certification when it filed its application on October 30, 1989. Therefore, through its behavior, Elf has shown itself to be a risk as to its truthfulness and reliability in a matter that is pivotal to the Commission's licensing process. Thus, Elf is found to be basically unqualified to receive a construction permit for Killington. *See Fox River Broadcasting, Inc., supra* and the Commission's *Character Qualifications Policy Statement, supra*.

MBLP's Integration Rejected

91. MBLP will not be awarded integration credit because the evidence does not support a finding that the putative general partner, Judith Leech, has ever been in control of the prosecution of MBLP's application from its genesis to the present. (*See* Paras. 57 to 71, *supra*.) Her brother Michael, with whom she was employed at the Poultney station, was the primary promoter. He and the limited partners reduced Leech's equity interest from 70% to 20% and also restructured the applicant without Ms. Leech's meaningful participation in the decision. (*See* Paras. 62-63, *supra*.) Also, it was Michael who prepared the cost estimate, arranged for engineering and legal services, and obtained the transmitter site. (*See* Para. 63, *supra*.) Judith is Michael's employee at Poultney where she has no equity interest. It is very much in Judith's interest to do Michael's bidding in order to keep her employment since the evidence does not indicate that she would have any other employment opportunity in the area where she resides. Also, she is personally indebted to Bourdow for her capital payments. These facts support the inferences that when or soon after the station's broadcast operations commence, Judith Leech will be no more than an employee at Killington under the direction of Michael and the limited partners. Under circumstances such as these, where it can be inferred that limited partners will exercise influence or control over an applicant's ongoing business, an integration proposal will be rejected.

Compare Victory Media, 3 F.C.C. Rcd 2073, 2075 (Comm'n 1988) (non-voting shareholders). *See also Progressive Communications, Inc.*, 3 F.C.C. Rcd 5758, 5762 (Review Bd 1988). The evidence cited above establishes that Michael Leech, the promoter, was not passive after MBLP's predecessor was organized.

92. In addition, the evidence does not support MBLP's burden of proof to establish by a preponderance of the evidence that its proposal is in the public interest. *See TeleStar, Inc.*, 2 F.C.C. Rcd 7352, 7353 (Comm'n 1987). MBLP is not entitled to any integration credit because the preponderance of the evidence establishes that Judith Leech has not been in control of the prosecution of MBLP's application. *Compare Doylan Forney, et al.*, 3 F.C.C. Rcd 6330, 6331-32 (Review Bd 1988) (no integration credit awarded when non-voting shareholders played a controlling role in structuring applicant). *See also Utah Television Associates*, 102 F.C.C. 2d 1470, 1478-79 (Review Bd 1985) (integration denied where proposed principals were shown to be "passive," "unfocused," and "unknowledgeable"). Each of those descriptive adjectives apply to Judith Leech. *See also Jarad Broadcasting Co., Inc.*, 1 F.C.C. Rcd 181, 183-84 (Review Bd 1986) (credit reduced for passivity and lack of knowledge about significant aspects of the proposal). Based on the evidence and the relevant case decisions, MBLP will not be credited with Judith Leech's proposed integration. MBLP's proposal will be considered below only on a contingent basis should the finding and conclusion of the presiding judge later be reversed.

Comparative Coverage

93. Each of the applicants will serve virtually the same size area and no applicant proposes to serve any white or gray areas. So there will be no award of a moderate or substantial coverage preference. *See Tucson Community Broadcasting*, 62 Radio Reg. 2d (P&F) 481, 483 (Review Bd 1987).

94. Elf and Gary will serve 184,491 persons in an area of 8,503 sq. km.; MBLP will serve 181,927 persons in an area of 8,260 sq. km.; KL will serve 178,880 persons in an area of 8,057 sq. km.; and KBL will serve 172,150 persons in an area of 7,423 sq. km. MBLP is close to Elf and Gary in total proposed coverage with respect to both population and area. There are two comparatively underserved areas (nighttime) for which Elf and Gary will offer superior coverage by factors of 5,547 persons where there are four night services and 465 persons where there are three night services. And there are two areas where Elf and Gary will offer slightly superior coverage by factors of 1,447 persons and 3,244 persons where there are four and three daytime aural services respectively. Accordingly, Elf, Gary and MBLP are entitled to slight preferences over KBL for providing greater overall service to underserved areas and in providing new third and fourth daytime services. *Christian Broadcasting of the Midlands, Inc.*, 99 F.C.C. 2d 578, 582-83 (Review Bd 1984); *Cotton Broadcasting Company*, 60 Radio Reg. 2d (P&F) 982 (Review Bd 1986). *Compare Radio Jonesboro, Inc.*, 96 F.C.C. 2d 1106, 1113 (Review Bd 1984). However, among Elf, Gary and MBLP the differences are so minimal that no preference *inter se* is warranted.

95. KL receives a very slight coverage preference over KBL for a total service advantage of 3.8%. *See Cotton Broadcasting Company, supra*. The Bureau is correct that no greater preference is warranted for KL because its third and fourth service advantage in the daytime is reversed at night. *Compare Daytona Broadcasting Company, Inc.*, 97 F.C.C. 2d 212, 231-32 (Review Bd 1984). Accordingly, under these analyses, Gary, Elf and MBLP are awarded a slight comparative coverage preference over KBL and a very slight preference over KL and KL receives a very slight preference over KBL.

Comparative Analysis and Conclusions

96. KL offers no integration and so it has no proposal to compare. The remaining four applicants provided evidence of auxiliary power. Also, each of the four applicants to be compared proposes 100% integration for a sole principal. Therefore, there is no "HHI" analysis required in this case. *Compare Omaha TV 15, Inc.*, 3 F.C.C. 2d, *Slip Op.* FCC 88-371, released December 19, 1988 at 10-13.

97. ELF is disqualified for its false financial certification and MBLP receives no integration credit because the proposed manager has failed to show that she controls the application and would control the station. The finalists are Gary and KBL. KBL is the winner because Gary has failed to offer substantial evidence that his business AEG (Gary's initials), which he has no plans to sell, would be able to continue without his regular services and he has failed to convince that he is disposed to becoming a broadcast manager.

98. Recall that the evidence shows Gary's residence to be in Hartford, Connecticut where his real estate development business is located, and where he has resided since 1969. Gary can claim no credit for local residency or civic ties to the Killington community which he has visited only once. (Gary, Tr. 134). While Gary represents that he will surrender day-to-day operations of his successful AEG business to an employee of several years whom he has trained, that person was not produced as a witness to convince the fact-finder of Gary's assertion which is critical to Gary's case. Also, it is noted that Gary has no experience in broadcasting, a limitation which he considers to be an "asset" to managing a station. (Gary, Tr. 199.) Such evidence offered by Gary fails to convince that he would leave his business that he has worked hard to establish in Hartford so that Gary can manage a broadcast station in Killington. Accordingly, Gary's integration proposal is rejected because, as a matter of law, he has failed to demonstrate with a preponderance of the evidence how he will accommodate his AEG business, which he founded and which he intends to continue owning, so as to fulfill his proposed commitment to manage a Killington broadcast station. *See Washoe Shoshone Broadcasting*, 3 F.C.C. Rcd at 3955 (Review Bd 1988). *See also Jarad Broadcasting* at 189 (commitments to other business ventures were too major an undertaking to support a finding of a 40 hour per week commitment to a broadcast station).

99. Under an alternative contingent analysis, if Elf were found to qualify Elf would be the winner. Mr. Elfstrom has resided in the service area since 1977 and he is committed to moving to Killington. His civic activities are considerable. He also has considerable broadcast experience which he gained since 1980, culminating in a promotion to general manager of Station WNNE-TV in 1988. Elf receives a preference over KBL for these superior qualities. *See Jarad Broadcasting* at 186. Elf also qualifies for a minority preference for Elfstrom's status as an American Indian.[14] These qualitative characteristics of

Elfstrom are superior to KBL's Mr. Ewald, who also has resided in Killington and in the service area with which he is familiar. But Ewald does not have comparable broadcast experience and he fails to qualify for a minority preference. While the residency duration of Ewald and Elfstrom are substantially the same, Elfstrom's active involvement with the Jaycees, the Lions Club, and his volunteer hospital work shows broader appreciation of local civic problems than Ewald's tenure on zoning committees which ties in with Ewald's profession as a real estate attorney. Also, Elf's coverage proposal is superior to KBL's. Elf's contingent superiority remains even though Elfstrom failed to commit to leave his employment as sales manager at WNNE-TV, Hartford, VT, by the "B" cut-off which failure results in a slight diversification demerit against Elf. *See Cuban - American Limited*, 2 F.C.C. Rcd 3264, 3268 (Review Bd 1987) (significant managerial position counts for diversification and requires timely divestment commitment to avoid demerit).[15]

100. Judith Leech, MBLP's proposed manager, has only lived in the service area since 1986. She does not have nearly the equivalent local residency and related civic activities as Elfstrom. For example, Ms. Leech assumed membership in local chambers of commerce since 1986, after the application was filed, while Elfstrom was an active member of the Jaycees since 1977. Elfstrom also has participated on significant local school and hospital service committees for the past four years. And while Ms. Leech represents that she is general manager of Station WVNR, that station is owned by her brother and in view of Ms. Leech's inability to convince as a witness that she was in control of MBLP's application, she will not be credited with broadcast experience equivalent to that of a general manager for a station which her brother owns. *Compare Jarad Broadcasting* at 183, 185 (Shaw's 100% integration denied when cross-examination revealed lack of knowledge and passivity on significant aspects of application). Also, the open-ended loans to Leech from Bourdow further weakens MBLP's integration proposal. *See Jarad Broadcasting* at 184. Finally, Mr. Elfstrom's preference as a Native American is comparatively superior to Ms. Leech's female preference. *Compare Mid - Florida TV Corp.*, 69 F.C.C. 2d 607, 652 (Review Bd 1978), *set aside on other grounds*, 87 F.C.C. 2d 203 (1981) (minority preference receives higher credit than gender preference). Gary has no credit for local civic activities or broadcast experience. Gary does qualify for a minority preference but he still finishes behind Elf and KBL because Gary lacks local civic involvement as well as broadcast experience. *See Radio Jonesboro, Inc.*, 100 F.C.C. 2d 941, 942-43 (Comm'n 1985). But Gary would finish ahead of MBLP and KL if his commitment to move to Killington was accepted.

ORDER

Accordingly, based on the foregoing, IT IS ORDERED that unless an appeal from this Decision is taken by a party, or unless the Commission reviews this Decision on its own motion,[16] the applications of Albert E. Gary (File No. BPH-851029MH), Mountain Broadcasting Limited Partnership (File BPH- 851030MP), Elf Broadcasting Company (File No. BPH-851030MQ) and Killington, Ltd. (File No. BPH-851030MZ) ARE DENIED.

IT IS FURTHER ORDERED that the application of Killington Broadcasting, Ltd. (File No. BPH-851030MN) for a Construction Permit for a new FM station on Channel 287C at Killington, Vermont IS GRANTED, subject to prescribed environmental conditions.

FEDERAL COMMUNICATIONS COMMISSION

Richard L. Sippel
Administrative Law Judge

FOOTNOTES

[1] At the time of trial, Betty was engaged in two business projects: an equipment leasing company and a one-third partnership interest in a sports marketing company. (Betty, Tr. 1740.)

[2] A complete analysis of the Lebanon estimated costs will not be set forth in findings because the data prepared for Lebanon is irrelevant to cost estimates for Killington. *See* Para. 13, *infra*. In summary, in 1984, Elfstrom wrote out estimates for equipment, salaries, telephone, supplies, etc. which totalled $178,138 (Elf Exh. 18A.) Later in 1984, revised estimates were prepared for 3 months operations, transmitter building and components, studio modifications, office equipment/furniture, installation costs, tape system, telephone, and miscellaneous equipment for a total of $220,400. (Elf Exh. 19.) Elfstrom states that he checked these costs with an engineer before he certified to the Killington application on behalf of Elf. (Elf PFC at 4-5.) The engineer was never proferred as a witness on behalf of Elf.

[3] Puglia was asked specifically on cross-examination whether his practice was primarily business or corporate law. He testified that his practice could not be categorized. But he categorized what he does not practice (criminal law, workman's compensation and administrative law). He does generally have an estate practice, counsels other attorneys on real estate litigation and appeals, and handles business and real estate closings. From time to time he has organized limited partnerships for clients as needs arose. (Puglia, Tr. 1800.) He also served on a part time basis (one day per month) as an elected Magistrate for Nassau County from 1972 to 1986. (Puglia, Tr. 1783-84; 1791-93.)

[4] It is recognized and notice is taken of the fact that attorneys in private practice receive payments from clients in the form of fees as distinguished from "salaries." Such fee arrangements vary from client to client in terms of retainers and frequency and timeliness of payments. But Puglia should have a general idea of his gross income reported for income tax purposes and he could have readily provided estimated annual fees if Elfstrom had asked or if he was willing to disclose that information.

[5] Hill was serving on the board of directors of Station WNNE-TV where Elfstrom was employed as general manager. Hill knew Elfstrom since around mid 1984. (Hill, Tr. 1833.)

[6] On cross-examination by Elf (Hill was called on direct by KBL), counsel for Elf attempted to elicit from Hill an opinion of Elfstrom's reputation for truthfulness in the local community. Hill testified that he knew of Elfstrom's marital and family status, his position at Station WNNE-TV and that he (Hill) has spoken to other people in the community about him (Elfstrom). Hill testified without being asked that Elfstrom has a fine character, he is a very good citizen, and he is involved locally in many organizations that indicate an interest in the welfare of the community. He was specifically asked by Elf's counsel

whether he knew Elfstrom's reputation for truth and honest in the community. But after *voir dire* by the presiding officer, Hill testified that he knew Hill from the TV station rather than from his reputation in the community. Therefore, the presiding judge refused to accept Hill's opinion testimony of Elfstrom's reputation for truthfulness in the community. Although Elfstrom's truthful character was put in issue by KBL's request for the added misrepresentation issue (FRE 608(a)), specific instances of good conduct are generally not permissible on direct examination of a witness to a party's character. *See* FRE 405(a)(b) and related Advisory Committee Note. Hill's attempted reputation testimony was rejected when Hill testified that it was based on specifics learned at the station and not on general reputation in the community. *See also* FRE 403 (exclusion of evidence which would waste time or induce delay).

[7] *See Report and Order in Docket 80 - 90*, 94 F.C.C. 2d 152 (Comm'n 1983), *on reconsideration*, 97 F.C.C. 2d 279 (Comm'n 1984).

[8] There have been earlier attacks launched on KBL's proposal. Elf's motion for leave to depose Sczuldo was granted. *See Order*, FCC 89M-563, released February 16, 1989. Thereafter, Sczuldo was ordered to produce notes and memoranda of conversations between Ewald and himself and other conversations in which Sczuldo participated. *See Order*, FCC 89M-680, released March 2, 1989. But since little more was shown after such discovery, Sczuldo was not required to appear for cross-examination although Sczuldo ultimately appeared for that purpose. *See Order*, FCC 89M-709, released March 3, 1989. A later motion filed by Elf seeking to add a misrepresentation issue based on Ewald's deposition testimony was denied. *See Memorandum Opinion and Order*, FCC 89M-1262, released April 24, 1982.

[9] It is clear from Sczuldo's letter dated October 18 that Sczuldo was more than a mere messenger. (Elf, Exh. 6.) It's a "dear Carl" letter stating that SFA is to provide for all the engineering requirements "as we discussed." Sczuldo's family have broadcast interests and Sczuldo had access to others who could give technical direction.

[10] Volunteer services incident to Ewald's ski activities for which he was compensated with courtesy ski privileges will not be considered because they are more personal and recreational than civic oriented. Also, Ewald has been involved in commercial ski development projects and there is a natural blend between volunteer ski activities where developers can meet, even while serving as ski instructors. *Compare Newton TV Limited*, 3 F.C.C. Rcd 553, 555-56 (Review Bd 1988).

[11] Bourdow and Schmick operated Station WKEU AM and FM in Griffin, Georgia from August 1986 to December 1988. Both persons have consulted for broadcasting projects. Schmick operated Station WJON at Stanton, Virginia from the 1970 to 1982. (Bourdow, Tr. 1014-15.)

[12] The evidence does not explain why DMI was used as the vehicle for Bourdow and Schmick as limited partners initially and why DMC was used for the same purpose later when KBL was structured as the successor applicant. Both DMI and DMC are corporations that are wholly owned by Messrs. Bourdow and Schmick. But the enigma need not be resolved here.

[13] To effect this, in March 1987, Puglia prepared a name change amendment to the certificate of partnership and he also filed an appropriate trade name registration form. (Puglia, Tr. 1333-34, 1338.)

[14] Mr. Elfstrom meets the standard for credit as an American Indian. He has offered documentary evidence in the form of his and his mother's birth certificate (Elf Exh. 1 and Elf Exh. 2) and the corroborating testimony of his mother. (Cloma Marie Elfstrom, Tr. 699-707.) *See also* Findings at Para. 78, *supra*. Elfstrom has presented persuasive and reliable evidence sufficient to show his American Indian heritage. *Compare Jarad Broadcasting* at 183.

[15] It is noted that Elf did not totally ignore its obligation and a commitment to leave WNNE-TV was made in an amendment that Elf filed on June 23, 1988. The commitment was renewed in Elf's integration and diversification statement. However, the facts do not support Elf's assertion that it is entitled to a presumption that Elfstrom would leave his employment at WNNE-TV. Elf relies on *Rahu Broadcasting, Inc.*, 56 Radio Reg. 2d (P&F) 285 (Review Bd 1984), a case where such a presumption was made as to the position of "office manager" under circumstances wherein the party's husband owned the other station where she was employed and he had made a timely promise to divest the station. The facts of *Rahu* do not support a similar conclusion here. Also, Elfstrom's position as a sales manager was policy-making while the position of office manager does not involve policy.

[16] This *Initial Decision* shall become effective and this proceeding shall be terminated 50 days after its public release if exceptions are not filed within 30 days thereafter, unless the Commission elects to review the case on its own motion. 47 C.F.R. §1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-606

In re Applications of

RAYMOND J. JEAN - MARIE STRONG (hereafter "Strong") — File No. BPH-871223MQ

ROBERT C. BYRD, MILTON J. RODGERS & HOWARD W. BYRD, A GENERAL PARTNERSHIP, D/B/A BARTLETT MEDIA (hereafter "Bartlett Media") — File No. BPH-871224MC

RICHARD P. BOTT (hereafter "Bott") — File No. BPH-871224ME

BELZ BROADCASTING CO. (hereafter "Belz") — File No. BPH-871224MI

GREATER MEMPHIS BROADCAST LIMITED PARTNERSHIP (hereafter "GMB") — File No. BPH-871224MM

For Construction Permit for a New FM Station on Channel 225A (92. 9 MHz) in Bartlett, Tennessee

HEARING DESIGNATION ORDER

Adopted: December 12, 1989; Released: January 18, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *GMB.* Information before the Commission indicates that GMB was organized and is affiliated with Sonrise Management Services ("Sonrise"). Sonrise has been the subject of numerous "real party-in-interest" issues added by presiding Administrative Law Judges in a number of mutually exclusive proceedings. For example, issues concerning Sonrise have been designated in each of the following proceedings:

City/State	Docket No.
Solona, Florida	87-464
Rockledge, Florida	87-556
Silver Springs, Florida	88-119
East Ridge, Tennessee	88-122
Oliver Springs, Tennessee	88-201
Des Moines, Iowa	88-238
Nags Head, North Carolina	88-277
Tyler, Texas	88-280
Raleigh, North Carolina	88-306
Sedona, Arizona	88-335
Mableton, Georgia	88-400
Evansville, Indiana	88-403
Swanton, Ohio	88-432
Atlantic City, New Jersey	88-433

Identical issues were specified in each of the proceedings: whether or not Sonrise is a real party in interest in the subject applicant, whether or not the applicant's organizational structure was a sham, and the effect thereof on the applicant's qualifications to be a Commission licensee. In each of the proceedings listed above, the Sonrise-affiliated applicant has dismissed its application rather than litigate the potentially disqualifying character issue. This unresolved character issue calls into question GMB's qualification to be a Commission licensee. Therefore, such issue will be specified against GMB in this proceeding.

3. Section II, Item 4 of FCC Form 301 (October 1986) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. GMB has not completed Item 4 correctly. GMB's application gives a post office box number as the residence for its principals, W. Bryan Andrews, F.M. Brown, Jr., Fran Blair Brown, and David L. Thomas. Accordingly, GMB must submit an amendment which gives all the information required by Section II, Item 4 to the presiding Administrative Law Judge within 30 days of the release of this Order.

4. The folowing applicants have petitioned for leave to amend their applications on the dates indicated. The accompanying amendments were filed after the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANT	DATE OF AMENDMENT
Bott	March 14, 1988; September 27, 1988
Belz	March 7, 1988; April 22, 1988; April 20, 1988;
GMB	November 16, 1988; November 22, 1988; December 22, 1988; December 28, 1988; March 6, 1989; May 19, 1989; June 6, 1989; October 30, 1989

5. Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and the applicants below have been unsuccessful. Accordingly, since no determination has been received as to whether the an-

tenna proposed by Bott and GMB would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

6. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

7. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether Sonrise Management Services, Inc. is an undisclosed party to the application of GMB.

2. To determine whether GMB's organizational structure is a sham.

3. To determine, from the evidence adduced pursuant to Issues 1 through Issue 2 above, whether GMB possesses the basic qualifications to be a licensee of the facilities sought herein.

4. To determine whether there is a reasonable possibility that the tower heights and locations proposed by Bott and GMB would constitute a hazard to air navigation.

5. To determine which of the proposals would, on a comparative basis, best serve the public interest.

6. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

8. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

9. It IS FURTHER ORDERED, That GMB shall submit an amendment which contains the information required by Section II, Item 4 of FCC Form 301, to the presiding Administrative Law Judge within 30 days of the release of this Order.

10. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Bott, Belz and GMB ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated.

11. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

12. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

13. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-575

In re Applications of

SUSAN E. TURGETTO (hereafter: Turgetto) — File No. BPH-850711MP

JANE A. FILLER D/B/A SUTTER CREEK RADIO (hereafter: SCR) — File No. BPH-850712NF (PREVIOUSLY DISMISSED, REINSTATED HEREIN)

For Construction Permit for a
New FM Station on Channel 269A
in Sutter Creek, California

HEARING DESIGNATION ORDER

Adopted: November 16, 1989; Released: January 18, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.[1]

2. *Preliminary Matters.* On October 20, 1986, a Petition to Deny Turgetto's application was filed by SCR. SCR alleges that Turgetto's application is not sufficient for tender because: (1) the engineering section of Turgetto's application is not on an actual Government Printing Office (GPO) copy of FCC Form 301 as required by the instructions to Form 301, but rather is on a reproduction of the form which, in one instance, is not identical to Form 301; (2) the "Facilities Requested" portion of Section V-G does not contain a description of Turgetto's side-mounting proposal as required by Paragraph 4(h) of the Commission's Public Notice of May 16, 1985, 58 RR 2d 166 (1985) (" *Public Notice* "); and (3) the sectional aeronautical map submitted by Turgetto in response to Item 10, Section V-B, does not contain the information requested in Item 10(d), *i.e.*, the area and population within the 1 mV/m contour, as required by Paragraph 4(g) of the *Public Notice*.

3. In its November 3, 1986 Opposition to Petition to Deny, Turgetto argues that: (1) the use of a facsimile of Form 301 is permissible because there is no express requirement that an actual GPO copy of Form 301 be used exclusively by applicants; (2) the detailed drawing of the proposed tower and side-mounted antenna (Figure 4 in the engineering statement) fully responds to the Section V-G requirement to provide a description of the side-mounting proposal; and (3) the topographic map (Figure 1 in the engineering statement) contains all the information requested in Item 10, Section V-B.

4. In its Reply to Opposition to Petition to Deny, filed November 12, 1986, SCR contends that: (1) Turgetto's application was not filed on a facsimile of Form 301 but on a flawed reproduction thereof, *i.e.*, Turgetto did not use a copy of Form 301 but rather a self-made form that differed from FCC Form 301; (2) a written description is required by the "Facilities Requested" portion of Section V-G, as well as by Item 5 therein, and Turgetto's drawing is not a permissible substitute therefor; and (3) the omission of the area and population data from Turgetto's sectional aeronautical map is not corrected by its provision elsewhere in the application.

5. The Court of Appeals for the District of Columbia Circuit, in a recent line of cases here controlling, clarified and reaffirmed the Commission's statutorily prescribed two-step process for judging the sufficiency of a petition to deny.[2] Consequently, it is well established that in order to obtain an evidentiary hearing, the proponent of a petition to deny must first set forth specific allegations of fact sufficient to show that "a grant of the application would be *prima facie* inconsistent with the public interest, convenience and necessity." 47 U.S.C. § 309(d)(1). Second, if the petition meets these requirements, then and only then, must the Commission determine whether, "on the basis of the application, the pleadings filed, or other matters which the Commission may officially notice, a substantial and material question of fact is presented." 47 U.S.C. § 309(d)(2). If not, no evidentiary hearing need be held. *Citizens for Jazz on WRVR, Inc. v. FCC*, 775 F.2d 392, 394 (D.C. Cir. 1985).

6. The *prima facie* sufficiency determination is to be made on the assumption that the specific facts set forth by the complaining party are true, and without reference to contrary evidence. *Id.* at 397. In other words, the Commission must perform this threshold inquiry on the basis of the petitioner's allegations alone; the Commission is limited to consideration of the petition and its supporting affidavits during this initial inquiry. *Astroline Communications Co. v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988). In the instant case, the petitioner alleges that Turgetto's application contains three defects that render it not sufficient for tender. After consideration of the petitioner's allegations, as required under 47 U.S.C. § 309(d)(1), we are not persuaded that the assumed violations, standing alone, are sufficient to establish that grant of the subject application would be *prima facie* inconsistent with the public interest, convenience and necessity. *See, e.g., Banks Broadcasting Co.*, 50 Fed. Reg. 16,138 (1985); *Kist Corp.*, 99 FCC 2d 173 (1984), *aff'd as modified*, 102 FCC 2d 288 (1985), *aff'd sub nom. United American Telecasters, Inc. v. FCC*, 801 F.2d 1436 (D.C. Cir. 1986), *cert. denied*, 107 S. Ct. 2182 (1987); *Julie P. Minor (KDXU)*, 51 FCC 2d 1163 (Rev. Bd. 1975); *Catoctin Broadcasting Corp. of New York*, 2 FCC Rcd 2126 (Rev. Bd. 1987). In this regard, we note that, even if taken as true, SCR's unchallenged allegations do not establish the existence of any rule or policy violations.

7. First, at the time of filing of Turgetto's application there was no requirement that an applicant use actual GPO copies of Sections V-B and V-G of FCC Form 301 in filing an application. The instructions to the form made no such demand; they simply indicated that Form 301, as opposed to a differently numbered form, was to be used to apply for a new FM station. In fact, the use of facsimiles of Sections V-B and V-G of FCC Form 301 has, in the past, been specifically approved by the Audio Services Division. We also note that, at the time of filing of Turgetto's application, there was a shortage of FCC Form 301s because of the heavy demand generated by the out-

come of the *Report and Order* in MM Docket 84-750, 50 Fed. Reg. 19,936. Consequently, the staff was advising many prospective applicants to utilize facsimiles in order to meet impending filing deadlines. Accordingly, the use of accurate facsimiles of Sections V-B and V-G of Form 301 by Turgetto was entirely permissible. As for the alleged discrepancy between Item 14 of Section V-B in Turgetto's application and Item 14 of Section V-B in FCC Form 301, the alleged difference is so slight as to be immaterial and thus would not render Turgetto's application not sufficient for tender. [3] Second, the alleged omission of a written description of Turgetto's side-mounting proposal would not be fatal because the detailed drawing of the proposed tower and side-mounted antenna (Figure 4 in Turgetto's engineering statement) provides all the requisite information. Since "the information can be derived . . ., confidently and reliably, drawing on the application as a whole, [this] defect [would] not render [Turgetto's] application not sufficient for tender." *Public Notice* at 169. *See also Report and Order*, *supra*, at 19,946. Third, although the sectional aeronautical map submitted by Turgetto allegedly does not contain the area and population within the 1 mV/m contour, that information can be found on the topographic map (Figure 1 in Turgetto's engineering statement). Again, since we can confidently and reliably derive this information by drawing on the application as a whole, this defect would not render Turgetto's application insufficient for tender. Consequently, we find that SCR's allegations fall far short of the standard set forth in 47 U.S.C. § 309(d)(1) that a grant of the application would be *prima facie* inconsistent with the public interest, convenience or necessity.

8. Having found that the petition fails to comport with the requirements set forth in 47 U.S.C. § 309(d)(1), *i.e.*, to plead specific facts which, if assumed true, show that grant of the subject application would be *prima facie* inconsistent with the public interest, convenience and necessity, we need not reach the issue of whether a substantial and material question of fact is presented. Accordingly, the Petition to Deny filed by SCR will be denied.

9. On March 13, 1989, a *Notice of Proposed Rule Making*, 4 FCC Rcd 2297 (1989), was released seeking comments on, *inter alia*, the substitution of Channel 276A for Channel 269A at Sutter Creek, California. Should the Commission amend the FM Table of Allotments to grant this request, and should that proceeding be finalized prior to the issuance of a permit for Channel 269A at Sutter Creek, the applicants may amend their applications to specify the new channel without loss of "cut-off" status.[4]

10. *City Coverage*. Jane A. Filler d/b/a Sutter Creek Radio ("SCR") filed an application for construction permit for a new FM station on Channel 269A in Sutter Creek, California, on July 12, 1985 (BPH-850712NF). The allocation for Channel 269A at Sutter Creek was properly spaced when allocated prior to March 1, 1984, but became short-spaced under the new spacing rules adopted in the *Report and Order* in Docket 80-90, 94 FCC 2d 152 (1983), in which the Commission amended 47 C.F.R. § 73.207 to require additional protection for stations on second- and third-adjacent channels. This resulted in a situation where an applicant for the Sutter Creek allotment could not propose a transmitter site which would simultaneously meet both the city coverage requirements under 47 C.F.R. § 73.315(a) and the new spacing requirements under 47 C.F.R. § 73.207, which became effective March 1, 1984. SCR's application proposes a site that was fully spaced under the new rules, but deficient as to city coverage since it does not provide a 3.16 mV/m signal to the entire proposed city of license as required by 47 C.F.R. § 73.315(a). SCR's application was put on Notice of Tenderability on August 13, 1985. Pursuant to 47 C.F.R. § 73.3566, since its deficient city coverage proposal was accompanied by a waiver request, SCR's application was accepted for filing on September 19, 1986. Following acceptance for filing, SCR's application was reviewed for grantability and its waiver request considered. In support of its waiver request, SCR states that: (1) although no part of the city of license will be covered by the 3.16 mV/m signal, 100 percent of the city will be served by the 1 mV/m signal; (2) there are no sites that would meet the minimum spacing requirements under 47 C.F.R. § 73.207 with respect to third adjacent Channel 266B, KHYL(FM), Auburn, California and first adjacent Channel 288B, KAMB(FM), Merced, California and still provide a signal strength of 3.16 mV/m over Sutter Creek, California; and (3) the proposed site is the closest possible location to Sutter Creek that is not short spaced.

11. By letter dated March 13, 1987, the Mass Media Bureau ("Bureau"), after a full examination of SCR's waiver request and the supporting circumstances, denied the waiver and dismissed the application as ungrantable. In the dismissal letter, the Bureau noted that while its interpretation of 47 C.F.R. § 73.315(a) has been relaxed to require provision of a 3.16 mV/m signal to only 80 percent of the area or population of the city of license, and that while waivers have occasionally been granted permitting even lower percentages of city coverage, the Commission has never sanctioned the grant of an application which proposed, as in the instant case, to provide city coverage to no part of the community of license. Additionally, the Bureau noted that SCR failed to plead with particularity the facts and circumstances which would warrant the grant of a waiver, and failed to give affirmative reasons to justify the grant of the waiver in the public interest. The Bureau also returned SCR's October 20, 1986 amendment, which proposed a new tower location which would provide the requisite city coverage, as unacceptable for filing because it was not filed: (1) prior to the expiration of the 30-day amendment as of right period following SCR's Notice of Tenderability; (2) pursuant to 47 C.F.R. §§ 1.65 or 73.3514; or (3) with a showing of good cause for late filing.

12. On April 13, 1987, SCR filed a Petition for Reconsideration[5] arguing that the Bureau erred in dismissing its application. SCR contends that it is traditional Commission policy to designate an issue against an applicant at hearing rather than dismiss that applicant predesignation where such applicant has requested a waiver of the Commission's rules but has supplied insufficient factual information to permit a determination of the request on the merits. SCR further argues that the Bureau was wrong to return its October 20, 1986 amendment curing the city coverage defect because there is good cause for its acceptance. SCR also contends that Turgetto's meeting with Bureau staff prior to filing made her privy to a policy decision with respect to this problematic allocation which enabled her to avoid the pitfalls encountered by fellow applicants.[6] SCR argues that such a policy decision should have been made public in order to allow all applicants to compete on equal footing and that, in light of this oversight, the Bureau should not have penalized the other

applicants for their inability to independently predict this policy stance. SCR thus requests that its application be reinstated and that a city coverage issue be designated.

13. We have carefully considered the matters raised in SCR's Petition for Reconsideration and find that, under Commission policy, if a mutually exclusive applicant's request for waiver of the city coverage requirement of 47 C.F.R. § 73.315(a) is denied, its application is routinely designated for hearing with an appropriate city coverage issue. *See, e.g., Marc A. Albert*, 54 Fed. Reg. 30,602 (July 21, 1989) (Hearing Designation Order). Accordingly, SCR's application will be reinstated *nunc pro tunc*. SCR's waiver request, however, does not provide sufficient justification for waiver of 47 C.F.R. § 73.315(a). Accordingly, the waiver request will be denied, and a city coverage issue will be specified. With respect to the Bureau's return of SCR's October 20, 1986 amendment, pursuant to 47 C.F.R. § 73.3522(a), all amendments filed outside the specified periods for amendments as of right and prior to designation for hearing must be accompanied by a showing of good cause, or filed pursuant to 47 C.F.R. §§ 1.65 or 73.3514. Unauthorized or untimely amendments are subject to return by the Commission's staff without consideration. SCR's October 20, 1986 amendment was submitted after expiration of the amendment as of right period following SCR's *Notice of Tenderability* and is therefore untimely. As the Bureau noted, SCR's amendment was not accompanied by a showing of good cause, and cannot be considered under 47 C.F.R. §§ 1.65 or 73.3514. Accordingly, SCR's amendment was properly returned. As for SCR's allegation of improper consultation between Turgetto and the Commission, any applicant or prospective applicant is entitled to consult with the Commission where a situation arises in which it might not be possible to satisfy one or another of the Commission's rules, provided that such consultation take place prior to the filing of competing applications. No public notice is usually given of such matters, and the lack thereof does not violate the Commission's prohibition against *ex parte* contacts or prejudice other applicants who are equally entitled to discuss the matter with the Commission but choose not to avail themselves of the opportunity.

14. *Short - Spacing*. In the *Report and Order* in Docket 80-90, *supra*, we amended our spacing rules under 47 C.F.R. § 73.207 to require additional protection for second- and third-adjacent channel stations. These amendments became effective March 1, 1984. However, in the *Memorandum Opinion and Order* (*MO & O*) in Docket 84-293, 2 FCC Rcd 1293 (1987), we stated that where allocations, or their antecedent petitions for rule making, were on file with the Commission prior to March 1, 1984, and were in compliance with the old minimum spacing requirements, the new spacing requirements for second and third adjacent channels would be automatically waived. *MO & O*, *supra*, at 1294. Since the allocation for Channel 269A at Sutter Creek, California was properly spaced when allocated prior to March 1, 1984, but became short-spaced under our present spacing rules, applicants are permitted to avail themselves of the more liberal spacing rules in existence at the time of the allocation. Turgetto's application, which was accompanied by a request for waiver of 47 C.F.R. § 73.207, proposes facilities which are 4.96 miles short-spaced to third adjacent channel Station KHYL(FM), Auburn, California under our present rules, but fully spaced under our old rules. Accordingly, the additional spacing requirement with regard to second and third adjacent channels will be waived pursuant to the *MO & O*, *supra*, and Turgetto's request for waiver of 47 C.F.R. § 73.207 will be dismissed as moot.

15. *Late - filed Amendments*. SCR and Turgetto have petitioned for leave to amend their applications on the dates specified below. The accompanying amendments were filed after September 13, 1985, the last date for filing minor amendments as of right. Under 47 C.F.R. § 1.65, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANT	AMENDMENTS FILED
SCR	August 6, 1986; October 6, 1986; December 22, 1986
Turgetto	October 8, 1985; September 5, 1986

16. *47 C. F. R. § 1. 65*. Pursuant to 47 C.F.R. § 1.65, applicants are required to timely amend their applications so as to keep them substantially complete and accurate. Whenever information furnished in a pending application is no longer substantially complete and accurate in all significant aspects, or whenever there has been a substantial change as to any other matter which may be of decisional significance in a Commission proceeding involving the pending application, the applicant is required to amend his application to furnish such information as may be appropriate within 30 days. Staff investigation reveals that SCR failed to report: (1) the return of applications for Bridge City, TX (BP-850425AC) on May 21, 1985; and Ridgebury, PA (BPH-860123NA) on January 6, 1987; (2) the dismissal of applications for Palermo, CA (BPTTL-820318TV) on October 29, 1985; Palermo, CA (BPTTL-820318TW) on June 30, 1988; Pittsburg, TX (BPH-860123MH) on February 17, 1988; and Christiansburg, VA (BPH-860203MJ) on October 16, 1987; (3) the designation for hearing of an application for Wauseon, OH (BPH-860123MV) on March 8, 1988; and (4) the grant of applications for Bridgeport, NE (BPH-850712WM) on February 26, 1987; and Solvay, NY (BP-850729AE) on April 7, 1988. Accordingly, SCR will be required to file an amendment completely and accurately updating its list of media interests (as well as any other currently inaccurate information) as required by 47 C.F.R. § 1.65.

17. *Areas and Populations*. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

18. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

19. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether SCR's proposal would provide coverage of the city sought to be served, as required by Section 73.315(a) of the Commission's Rules, and, if not, whether circumstances exist which warrant waiver of that Section.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

20. IT IS FURTHER ORDERED, That the October 20, 1986 Petition to Deny filed by SCR IS HEREBY DENIED.

21. IT IS FURTHER ORDERED, That SCR's Petition for Reconsideration IS GRANTED to the extent indicated herein, and that SCR's application IS REINSTATED *nunc pro tunc*.

22. IT IS FURTHER ORDERED, That, pursuant to paragraph 14 herein, the additional spacing requirement with regard to second and third adjacent channels IS WAIVED for all applicants, and Turgetto's request for waiver of 47 C.F.R. § 73.207 IS DISMISSED as moot.

23. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by SCR and Turgetto ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

24. IT IS FURTHER ORDERED, That, within 30 days of the release of this Order, SCR will be required to submit an amendment completely and accurately updating its application as required by 47 C.F.R. § 1.65 to the presiding Administrative Law Judge.

25. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

26. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, not later than, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

27. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTES

[1] The application of Silverado Broadcasting Group, Inc. (ARN-850712NE) was returned as unacceptable for filing on August 29, 1986. Silverado's petition for reconsideration was denied on March 13, 1987, by letter from the Chief, FM Branch (reference 8920-EDC).

[2] *See, e.g., Beaumont Branch of the NAACP v. FCC*, 854 F.2d 501 (D.C. Cir. 1988); *Gencom, Inc. v. FCC*, 832 F.2d 171 (D.C. Cir. 1987).

[3] Turgetto's Item 14 is alleged to contain two omissions [bracketed]: If there are any FM or TV stations within 200 feet of proposed antenna or non-broadcast radio stations (except amateur & citizens band), established commercial and government receiving station[s] in the [general] vicinity which may be adversely affected by the proposed operation, attach as Exhibit No._____ the expected effect, a description of remedial steps that may be pursued if necessary, and a statement from the applicant accepting full responsibility for the elimination of any objectionable effect on existing stations.

[4] *See Notice of Proposed Rule Making, supra*, at 2297, para. 5.

[5] Turgetto claims it was not served with SCR's Petition for Reconsideration, and thus filed Informal Comments on June 10, 1987.

[6] SCR refers to Appendix A of Turgetto's application in which Turgetto states that meetings were held with staff members of both the Policy and Rules Division and the FM Branch of the Mass Media Bureau prior to the filing of its application. As a result of these meetings, Turgetto states that the FM Branch agreed to accept a proposal that was fully spaced under the pre-Docket 80-90 separation rules provided that the technical requirements stated in the *Report and Order* assigning the channel to Sutter Creek were met.

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN Docket No. 89-623

In the Matter of

Procedure for testing Class A, B
and S emergency position
indicating radiobeacons (EPIRBs)

NOTICE OF PROPOSED RULE MAKING

Adopted: December 20, 1989; Released: January 17, 1990

By the Commission:

INTRODUCTION

1. By this action, the Commission proposes to establish a new procedure for testing Class A, B and S emergency position indicating radiobeacons (EPIRBs) operating under Part 80 of the Commission's Rules. The new procedure, "FCC Procedure for Testing Class A, B and S Emergency Position Indicating Radiobeacons (EPIRBs)," FCC/OET TP-8, is intended to set forth uniform methods for testing these devices for compliance with the present and proposed technical standards in Part 80 of the Rules.[1]

BACKGROUND

2. An EPIRB is a small, battery powered transmitter carried on maritime vessels to provide radiolocation signals in case of an accident at sea. EPIRB signals are intended to assist search and rescue units in locating survivors and offering assistance to stricken vessels. Class A, B, and S EPIRBs operate on 121.5 and 243 MHz.[2] Part 80 of the rules sets forth technical, operational, and environmental requirements for these EPIRBs. Class A EPIRBs are designed to float free of a vessel and activate automatically. Class B EPIRBs may be activated manually or automatically, but are not required to float. Class S EPIRBs may either float free or provide a means of attachment to a survival craft, and must be activated manually. All EPIRBs must be type-accepted under the procedures in Part 2 of the rules.[3]

3. In a recent FCC proceeding, the technical standards for Class A, B and S EPIRBs were modified to require that a percentage of the power during each audio sweep be concentrated about the carrier to enhance detection by satellite receivers.[4] This "spectral enhancement" requirement became effective for all EPIRBs manufactured after October 1, 1988. In that proceeding, the Commission indicated that test procedures for determining compliance with this new spectral enhancement requirement would be developed.

4. In 1988, the FCC Laboratory also conducted investigations of Class A, B and S EPIRBs in response to complaints to the Commission and the U.S. Coast Guard that certain EPIRBs had problems with water leakage.[5] Samples of most EPIRBs on the market were tested for compliance with the requirements in Part 80 of the rules. In addition, the U.S. Coast Guard tested some models for compliance with certain mechanical and environmental requirements, including water leakage. These investigations revealed a high rate of non-compliance for both the electrical and environmental tests. Accordingly, we believe a more comprehensive procedure for determining compliance with the Commission's Rules is necessary. We feel that such a procedure will provide EPIRB manufacturers with needed additional guidance and will improve the compliance rate of these important safety-related devices.

DISCUSSION

5. The proposed test procedure for Class A, B and S EPIRBs provides step-by-step instructions for performing the required type-acceptance measurements. Detailed procedures are provided for peak effective radiated power (PERP), spurious emissions, modulation characteristics, carrier frequency, spectral enhancement characteristics, and all environmental requirements.[6] In order to make these procedures more generally available to the public and to clarify that they has the full force of regulations, we are proposing to include the procedures into our rules.

6. The proposed test procedure specifies the method for determining compliance with the modulation characteristic requirements in the proposed rules in PR Docket 89-622. These requirements are for upper and lower audio frequencies, audio frequency range, audio sweep rate, modulation duty cycle, and modulation factor. In addition, the procedures specify a technique for measuring the carrier frequency stability over the temperature range of -20 to +50 degrees Centigrade as required by Part 2 of the rules.

7. Two different methods for determining compliance with the spectral enhancement requirements were developed by Westinghouse Corporation under contract to NASA in cooperation with the U.S. Coast Guard. Method 1, as set forth in the attached test procedure, is used for EPIRBs that have defined sidebands about the carrier. Method 2 is used for EPIRBs without defined sidebands. While method 2 is applicable technically to all EPIRBs, it provides less accurate measurements than method 1. The proposed procedure specifies both measurement methods. We request comments on whether both methods should be included in the procedure, or whether only one should be included.

8. The environmental and operational tests in the proposed procedure generally are based on those contained in Section 80.1061(a) of the rules for 406 MHz EPIRBs.[7] We have modified the tests as appropriate to apply to Class A, B and S EPIRBs. We request comments on whether the requirements in our proposal are adequate to insure the proper operation of the EPIRBs under the environmental conditions to which they can be expected to be exposed.

PROCEDURAL MATTERS

9. Under the procedures set out in Section 1.415 of the Commission's Rules, interested persons may file comments on or before **March 12, 1990,** and reply comments on or before **April 11, 1990.** All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. In reaching its decision, the Commission may take into consideration information and ideas not contained in the comments, provided such information or writing indicating the nature and source of such information is placed in the public file and provided that the fact of the Commission's reliance on such information is noted in the Report and Order.

10. In accordance with the provisions of Section 1.419 of the Commission's Rules, formal participants shall file an original and five (5) copies of their comments and other materials with the Secretary of the FCC. Participants wishing each Commissioner to have a personal copy of their comments should file an original and 11 copies. Members of the public who wish to express their comments are given the same consideration regardless of the number of copies submitted. All documents will be available for public inspection during regular business hours at the Commission's Public Reference Room at its headquarters in Washington, D.C.

11. For purposes of this non-restricted notice and comment rule making proceeding, members of the public are advised that *ex parte* contacts are permitted from the time the Commission adopts a notice of proposed rule making until the time that a public notice is issued stating that a substantive disposition of the matter is to be considered at a forthcoming meeting or until a final order disposing of the matter is adopted by the Commission, whichever is earlier. In general, an *ex parte* presentation is any written or oral communication (other than formal written comments/pleadings and formal oral arguments) between a person outside the Commission and a Commissioner or a member of the Commission's staff which addresses the merits of the proceeding. Any person who submits a written *ex parte* presentation must serve a copy of that presentation on the Commission's Secretary for inclusion in the public file. Any person who makes an oral *ex parte* presentation addressing matters not fully covered in any previously-filed written comments for the proceeding must prepare a written summary of that presentation. On the day of oral presentation, that written summary must be served on the Commission's Secretary for inclusion in the public file, with a copy to the Commission official receiving the oral presentation. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. *See, generally,* Section 1.1231 of the Commission's Rules.

INITIAL REGULATORY FLEXIBILITY ANALYSIS

12. Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. Section 603, the Commission's initial analysis is as follows:

I. Need and purpose of this action:

In the course of testing EPIRBs, we found a significant percentage to be non-compliant with the technical requirements in the Rules. Development of a comprehensive test procedure is necessary in order to provide more specific information on how the devices are to be tested for type-acceptance. Also, recent and proposed changes to the rules require that a procedure be provided for determining the compliance of EPIRBs with the rules. Finally, we believe it is necessary to include the test procedure into the Rules to make the test procedure more generally available to the public and to clarify that this procedure has the full force of our regulations.

II. The objectives:

Our objectives in proposing these changes are to add procedures for testing to the new requirements, to clarify, and where possible, to simplify the test procedures for EPIRBs. By providing additional guidance on how EPIRBs are to be tested, it is expected that the compliance rate for these devices will be increased.

III. Legal basis:

The actions proposed herein are taken pursuant to the authority contained in Sections 4(i), 301, 302 and 303 of the Communications Act of 1934, as amended.

IV. Description, potential impact and number of small entities affected:

The proposed changes will potentially affect all manufacturers of EPIRBs, and laboratories performing type-acceptance tests on such devices, but we do not know the exact number of small entities that would be affected. We believe that clarification and simplification of the test procedure will benefit manufacturers and test laboratories by providing more guidance on how these devices are to be tested, which will reduce compliance costs.

V. Recording, record keeping and other compliance requirements:

The proposed procedure marginally increases the amount of test data required to be recorded, since tests are added as a result of the new rules. No change in record keeping requirements are proposed.

VI. Federal rules which overlap, duplicate or conflict with this rule:

None.

VII. Any significant alternatives minimizing impact on small entities and consistent with the stated objectives:

None.

13. For further information on this proceeding, contact Hugh L. Van Tuyl or Thomas W. Phillips, FCC Laboratory, 7435 Oakland Mills Road, Columbia, MD 21046, (301) 725-1585.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A -- NPRM IN FCC GENERAL DOCKET 89-623

THIS DOCUMENT IS INTENDED TO SOLICIT COMMENTS. THE PROCEDURES CONTAINED HEREIN MAY NOT BE USED FOR COMPLIANCE TESTING UNTIL ADOPTED BY THE COMMISSION.

FEDERAL COMMUNICATIONS COMMISSION

PROPOSED FCC PROCEDURE FOR TESTING CLASS A, B AND S EMERGENCY POSITION INDICATING RADIOBEACONS (EPIRBS)

Federal Communications Commission
Authorization and Evaluation Division
7435 Oakland Mills Road
Columbia, MD 21046

FCC/OET TP-8 (1989) PROPOSED December 20, 1989

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SECTION I - GENERAL

1. INTRODUCTION

The procedure described herein sets forth uniform methods for testing Class A,B and S Emergency Position Indicating Radiobeacons (EPIRBs) for compliance with the applicable portions of the FCC Rules and Regulations.

2. TEST ENVIRONMENT

2.1 Measurement Sites

Radiated emission tests for PERP, spurious and power in the test mode are to be performed on an open field test site as shown in Figure 1. The site is to be located on level ground with an obstruction-free, 60 m by 52 m, elliptical area. The site is to be equipped with an antenna mast capable of adjustment from 1 to 4 m. The center of a metal ground plane at least one wavelength in diameter at 121.5 MHz (2.47 m) is to be located 30 m from the receiving antenna. The ground plane is to have provisions for mounting removable quarter-wave vertical elements to produce a monopole antenna at both 121.5 and 243 MHz with a VSWR of less than 1.5.

NOTE: It is desirable that the level of radiated ambient EME at the test site be at least 6 dB below the FCC limits applicable to the EPIRB. It is, of course, not always possible to meet this condition. If the ambient field strength at some frequencies within the specified measurement ranges is too high, it is recommended that one or more of the following corrective steps be employed:

1) Perform measurements in critical frequency bands during hours when broadcast and other radio stations are off-the-air and ambients from industrial equipment are lower.

2) Insofar as is possible, orient the axis of an open area test site to discriminate against strong ambient signals.

3) Vary the bandwidth of the measuring instrument to separate ambient EME from emissions from the EPIRB.

2.2 Test Frequencies

Testing of an EPIRB for compliance outside a shielded room on a distress frequency is prohibited, since this may interfere with emergency communications. Therefore, all compliance testing outside a shielded room should be conducted on one of the pairs of alternate frequencies specified below:

121.600/243.200 MHz
121.650/243.300 MHz
121.700/243.400 MHz
121.750/243.500 MHz
121.800/243.600 MHz
121.850/243.700 MHz
121.900/243.800 MHz

The above frequencies are to be used for limited testing of EPIRBs for compliance with FCC Rules, subject to the following conditions:

1) The testing shall not cause harmful interference to authorized communications on these frequencies.

2) The testing shall be coordinated with the nearest FCC district office.

For simplicity, 121.5 MHz and 243 MHz will be used throughout this test procedure to indicate the alternate test frequency.

2.3 Temperature

Except as otherwise noted, the temperature during testing should be within the range of 4 to 35 ^{0}C (40 to 95^{0}F).

3. TEST INSTRUMENTATION AND EQUIPMENT

3.1 Receiver (Field Intensity Meter)

A calibrated field intensity meter (FIM) with a frequency range of 30 to 1000 MHz is required for measuring radiated emission levels. This instrument should be capable of making peak measurements with a bandwidth of 100 kHz.

3.2 Spectrum Analyzer

Spectral measurements are to be made with a spectrum analyzer with a minimum resolution bandwidth no greater than 10 Hz. The video filter, if used, should have a bandwidth wide enough so as to not affect peak readings. A linear video output is desirable for performing measurements of modulation characteristics.

3.3 Storage Oscilloscope

Measurements of modulation characteristics are to be made using a calibrated storage oscilloscope. This instrument is to be DC coupled and capable of manually triggered single sweeps.

3.4 Frequency Counter

A frequency counter with an accuracy of at least 5 parts per million is required for measuring the carrier frequency.

3.5 Signal Generator

A calibrated signal generator with an output of at least 75 mW at 121.5 and 243 MHz is required for generating a reference signal for site calibration.

3.6 Antenna

Radiated emissions are to be measured with calibrated, tuned, half-wave dipole antennas covering the frequency range of 30 to 1000 MHz.

3.7 Temperature Chamber

Tests which call for subjecting the EPIRB to temperature levels other than the ambient temperature are to be performed in a temperature test chamber which can be adjusted to stable temperatures from -20 to +55 C. This chamber is to be of sufficient size to accommodate the EPIRB under test.

3.8 Vibration Table

A vibration table capable of vibrating the EPIRB in its three orthogonal axes with a sinusoidal motion is required. The table must be capable of varying the frequency of vibration either linearly or logarithmically over a range of 4 to 33 Hz with maximum peak amplitudes of up to 2.5 mm.

3.9 Salt Fog Chamber

A chamber capable of producing salt fog at a temperature of 35 C for 48 hours is required. This chamber is to be of sufficient size to accommodate the EPIRB under test.

3.10 Drop Test Facility

A facility which will permit dropping an EPIRB from a height of 20 m into water is required. The water must be deep enough so that the EPIRB will not touch bottom when dropped.

SECTION II - ENVIRONMENTAL AND OPERATIONAL TEST PROCEDURES

4. SEQUENCE OF TESTS

The environmental and operational tests in Paragraphs 4.1 through 4.5 are to be conducted on a single test unit in the order given below. This sequence of tests also includes the electrical tests in paragraphs 5, 6 and 7. The test unit is not to be adjusted, nor is the battery to be replaced during these tests, and a log of battery on-time should be maintained. The above tests are to be performed on the same test unit. The tests in Paragraphs 4.6 through 4.9 may be run in any sequence or may be performed on separate test units.

4.1 Vibration Test

Step 1)

Secure the EPIRB to the vibration table. The EPIRB should be secured only with the normal attachments or mounting apparatus supplied with the unit. Additional straps or other holding means should not be used. The EPIRB should be mounted in the same position for all vibration tests. The EPIRB is not to be operated while being vibrated.

Step 2)

Subject the EPIRB to sinusoidal motion in three orthogonal axes under the following conditions:

A.

Frequency (Hz)	Peak Amplitude (mm)
4-10	2.5
10-15	0.8
15-25	0.4
25-33	0.2

B. The frequency is to be changed either linearly or logarithmically with time between 4 Hz and 33 Hz such that a complete cycle (4 Hz to 33 Hz to 4 Hz) takes approximately 5 minutes.

C. The EPIRB is to be vibrated in the direction of each axis for at least 30 minutes or six complete cycles.

Step 3)

Upon completion of the test, perform an exterior mechanical inspection and verify operation by turning the unit on and observing the RF power indicator on the unit. Record test results.

4.2 Thermal Shock Tests

These tests are required only for Class A and floating Class S EPIRBs.

4.2.1 Low Temperature Thermal Shock Test

Step 1)

Place the EPIRB in a temperature chamber for at least 3 hours at -20^0C or colder. The EPIRB is not to be operated while being cooled.

Step 2)

Immediately place the EPIRB in water that has been maintained at $+10^0$C or warmer.

Step 3)

After 15 minutes, perform an exterior mechanical inspection and verify operation by turning the unit on and observing the RF power indicator on the unit. Record test results.

4.2.2 High Temperature Thermal Shock Test

Step 1)

Place the EPIRB in a temperature chamber for at least 3 hours at +55 degrees C or warmer. The EPIRB is not to be operated while being heated.

Step 2)

Immediately float the EPIRB in water that is maintained at +25 degrees C or colder.

Step 3)

After 15 minutes, perform an exterior mechanical inspection and verify operation by turning the unit on and observing the RF power indicator on the unit. Record test results.

4.3 Salt Fog Test

Step 1)

Place the EPIRB in a salt fog chamber for a period of at least 2 hours at a temperature of 35^0C ($\pm$ 2 C) before exposing it to salt fog. The EPIRB is to be turned off during this test.

Step 2)

With the chamber temperature maintained at 35^0C, introduce salt fog at the saturation point for 48 hours. The salt fog is to be prepared from a 5% ($\pm$ 1%) salt (sodium chloride) solution. For detailed guidance on the preparation of the solution and the apparatus for generating salt fog, refer to MIL-STD-810D (19 July 1983), method 509.2.

Step 3)

Upon completion of the salt fog exposure, the EPIRB is to be air-dried at room temperature for 12 hours and operation verified by turning the unit on and observing the RF power indicator of the device. Record observations.

4.4 Drop Test

This test is required only for Class A and Class S EPIRBs that are designed to float.

Step 1)

Turn the EPIRB on, log the time and drop it three times into water from a height of 20 meters. The water is to be deep enough so that the EPIRB does not touch bottom when dropped. Each drop should be initiated from a different orientation as follows: antenna vertical up; antenna vertical down; antenna horizontal.

Step 2)

Upon completion of the drop test, an exterior mechanical inspection is to be performed and operation verified by observing the RF power indicator. Record observations. Turn the test unit off and log the total on-time.

4.5 Forty-eight Hour Operational Test

This test includes the battery life test and all the electrical tests given in paragraphs 5 through 7, below, at various temperatures. The tests are to be performed on the same EPIRB in the sequence specified herein. Be sure to record the total on-time of the unit under test.

Step 1)

Turn the EPIRB on and record the time. The unit is to be left on throughout these tests until completion of Step 8 at the end of 48 hours.

Step 2)

Perform the radiated emissions test in paragraph 5.

Step 3)

Perform the modulation characteristic tests in paragraph 6.

Step 4)

Perform the spectral tests in paragraph 7.

Step 5)

With the EPIRB off, place unit in an environmental chamber at a temperature of -20^0C for at least 2 hours.

Step 6)

With the EPIRB in the chamber, repeat the carrier frequency test in paragraph 7.4. (Leave the EPIRB turned on.)

Step 7)

Near the end of 48 hours of total on-time for the EPIRB, repeat the carrier frequency test in paragraph 7.4.

Step 8)

At the end of 48 hours of total on-time, remove EPIRB from the chamber and immediately repeat the PERP test for the fundamental emissions in paragraph 5.3. The unit should be maintained at -20^0C to the extent possible for this test.

4.6 Automatic Release Mechanism and Activation Tests for Class A EPIRBs

This test is required only for Class A EPIRBs.

Step 1)

The EPIRB is to be installed in the automatic release mechanism and the assembly is to be mounted on a fixture simulating a deck or bulkhead as per manufacturer's installation instructions.

Step 2)

Submerge the fixture in water in its normal mounted orientation. The EPIRB must float free before reaching a depth of 4 meters and should automatically activate. Activation is to be verified by observing operation of the RF power indicator.

Step 3)

The test is then to be repeated four times with the fixture rotated each time 90 degrees to simulate the following vessel conditions:

1. Rolling 90 degrees to starboard.
2. Rolling 90 degrees to port.
3. Pitching 90 degrees bow down.
4. Pitching 90 degrees stern down.

If the EPIRB is equipped with an automatically deployable antenna, the antenna must properly deploy during each immersion. Record observations.

4.7 Stability and Buoyancy Tests for Class A and Class S EPIRBs

This test is required only for Class A and Class S EPIRBs that are designed to float.

Step 1)

With the antenna deployed in its normal operating position, submerge the EPIRB in a horizontal position just below the surface of the water.

Step 2)

Release the EPIRB and observe the amount of time required for it to come to an upright position. It must reach its upright position within one second from each position.

Step 3)

Repeat steps 1 and 2 with the EPIRB rotated about its vertical axis in steps of 45 degrees for a full rotation of 360 degrees.

In calm water, the EPIRB must have a reserve buoyancy of at least 5% of its gross weight and float upright with the base of the antenna a minimum of 5 cm above the water. Record the time in seconds required for the test unit to right itself from each position in the buoyancy test.

4.8 Temperature/Frequency Test

The frequency stability shall be measured over an ambient temperature from -20^0 to $+50^0$C at intervals of not more than 10 C. A period of time sufficient to stabilize all of the components of the oscillator circuit at each temperature level shall be allowed prior to frequency measurement.

Step 1)

Place the EPIRB in the environmental test chamber.

Step 2)

Adjust the temperature in the chamber to $+20^0$C and allow sufficient time for the oscillator to stabilize at that temperature.

Step 3)

Measure the carrier frequency in accordance with the procedure in paragraph 7.4. Record the carrier frequency in Hertz. The carrier frequency at $+20^0$C is the reference for determining the frequency tolerance.

Step 4)

Increase the temperature in the chamber to +50 C and allow sufficient time for the oscillator to stabilize at that temperature. Measure the carrier frequency using the procedure in paragraph 7.4.

Step 5)

Reduce the temperature in the chamber in 10 C increments until - 20^0C is reached. At each new temperature, allow sufficient time for the oscillator to stabilize at that temperature. Measure the temperature and frequency in each case and plot the frequency vs temperature from -20^0 to $+50^0$C.

4.9 Leakage and Immersion Test

Step 1)

Completely submerge the EPIRB in water for 48 hours. The EPIRB is to be turned off during this test.

Step 2)

Remove the EPIRB from the water and wipe dry.

Step 3)

Verify operation by briefly turning the EPIRB on and observing the RF power indicator on the device.

Step 4)

Open the EPIRB for examination. There is to be no water inside the unit. Record observations.

5. MEASUREMENTS OF RADIATED EMISSIONS

The Commission's Rules require that the peak effective radiated power (PERP) of a Class A, B or S EPIRB not be less than 75 mW under certain specified conditions. The PERP of an EPIRB transmitter is determined by comparing its level to a reference PERP generated by a standard quarter-wave monopole antenna with a one wavelength minimum diameter metal ground plane. The Rules also require that all spurious and harmonic emissions be attenuated by a specified amount with respect to the reference PERP. In addition, there is a limit on the PERP of radiated emissions with the switch in the test mode. These measurements are to be made in accordance with the following procedure.

5.1 General Set-up Instructions

Measurements of radiated electromagnetic emissions (EME) are to be performed on the 30 meter open field test site described in paragraph 2.1 and on one of the pair of frequencies listed in paragraph 2.2. A receiver, tuned dipole antennas and a calibrated signal generator as described in Paragraph 3 are required. The EPIRB should be powered by its own internal battery with its standard antenna attached and deployed.

5.2 Set-up for radiated EME Tests

Step 1)

Place a 121.5 MHz quarter-wave vertical antenna element at the center of the ground plane and connect the output of the calibrated signal generator to the antenna.

Step 2)

Mount the tuned dipole antenna on the antenna mast, tune the elements to 121.5 MHz and connect the antenna to the receiver.

Step 3)

After an appropriate warm up, turn the receiver to the frequency of the test unit, set the detector to peak mode and the bandwidth to 100 kHz. (Note: It is sometimes helpful to monitor the receiver audio output with a speaker. The EPIRB signal may be identified by its distinctive modulation.)

5.3 Radiated EME Tests

Fundamental Emissions

Step 1)

Turn on the signal generator and adjust the output to 75 mW at 121.5 MHz.

Step 2)

Vary the antenna height from one to four meters in both vertical and horizontal polarization. Record the highest receiver reading in dBm as the reference level.

Step 3)

Disconnect the signal generator and replace the quarter-wave vertical element on the ground plane with the EPIRB under test. The EPIRB is to be positioned directly on the surface of and in the center of the metal ground plane.

Step 4)

Activate the EPIRB.

Step 5)

Vary the receive antenna height from one to four meters in both vertical and horizontal polarization. Record the highest receiver reading in dBm and the instrument settings, antenna height and direction for maximum radiation, antenna polarization and conversion factors, if any, associated with that reading.

Step 6)

Repeat Step 5 with the EPIRB switch in the test position. Return the switch to the normal operation position.

Step 7)

Rotate the EPIRB 30 degrees and repeat Steps 5 and 6. Repeat this step for all successive 30 degrees segments of a full, 360 degree rotation of the EPIRB.

Step 8)

Repeat Paragraph 5.2 and Steps 1 through 7 for 243 MHz.

Step 9)

Compute the peak effective radiated power for the maximum level of each measured emission using the following formula:

$$PERP = 75 \times \log_{10}^{-1}\left[\frac{dB_{mmeas} - dBm_{ref}}{10}\right]$$

where:

dBm_{meas} is the measured receiver reading in dBm, and dBm_{ref} is the reference receiver reading found in step 2 of Paragraph 5.3.

Step 10)

Record the PERP in mW. The FCC limit for minimum power in the normal operation mode (i.e., with the EPIRB switch in the normal operating position) is 75 mW. The FCC limit for maximum power in the test mode is 0.0001 mW.

Spurious Emissions

Step 11)

Reset the signal generator to operate at 121.5 MHz.

Step 12)

For each spurious and harmonic emission to be measured, retune the receive antenna to the appropriate frequency and repeat Steps 5 and 7.

Step 13)

Determine the FCC limit on power for spurious emissions on the frequency of each measured emission as follows:

The rules require that spurious emissions be attenuated at least 43 + 10 log(power) decibels below the transmit power level. This is equivalent to a requirement that all spurious emissions be attenuated to a field strength level at least 31.75 dB below the reference field strength generated by the monopole antenna with 75 mW input. Therefore, the maximum received power limit for a spurious emission can be calculated from the formula:

$$dBm_{spur} = dBm_{ref} + AF_{121.5} - AF_{spur\ freq} - 31.75$$

where: dBm_{ref} = reference power level (Paragraph 5.3, step 2)

$AF_{121.5}$ = tuned dipole antenna factor at 121.5 MHz

$AF_{spur\ freq}$ = tuned dipole antenna factor at spurious freq.

Step 14)

Record in dB below the fundamental emissions the level of all spurious and harmonic emissions within 10 dB of the FCC limits.

6. Measurements of Modulation Characteristics

6.1 Set-up

Tests of modulation characteristics are to be performed in an RF shielded room.

Step 1)

Place the EPIRB directly on a metal ground plane, such as the shielded room floor.

Step 2)

Place a suitable receiving antenna at a convenient distance from the EPIRB and connect it to the input of the spectrum analyzer or receiver to observe the radiated signal from the EPIRB.

Step 3)

Set the spectrum analyzer or receiver controls as follows:

I.F. bandwidth:	300 kHz minimum
Video filter:	OFF or as wide as possible
Amplitude scale:	Linear
Frequency:	121.5 MHz or the alternate frequency for 121.5 MHz
Scan width:	0 Hz

Step 4)

Connect the detected output of the spectrum analyzer or receiver to the input of the storage oscilloscope.

Step 5)

Set the oscilloscope controls as necessary to allow the demodulated waveform to be viewed. The input signal is to be DC coupled.

6.2 Measurement of Audio Frequencies

Step 1)

Activate the EPIRB.

Step 2)

Trigger the oscilloscope and store at least one complete cycle of the audio waveform.

Step 3)

Measure the period (T) of the waveform. The period is the time difference between the half voltage points at the beginning and end of one complete cycle of the waveform. See Figure 2.

Step 4)

Calculate the frequency (F), where: F = 1 / T

Step 5)

Repeat Steps 2 through 4 until the highest and lowest audio frequencies are found. (Note: The lowest and highest frequencies may occur several cycles before or after the transition from low to high frequency.)

Step 6)

Determine the audio frequency range (F_{range}), where:

$$F_{range} = F_{high} - F_{low}$$

Step 7)

Record instrument settings. Also record the lowest and highest audio frequencies and the audio frequency range in Hertz.

Step 8)

Repeat steps 1-8, above, for 243 MHz.

6.3 Modulation Factor

Step 1)

Activate the EPIRB.

Step 2)

Trigger the oscilloscope and store at least one complete cycle of the audio waveform. The input signal is to be DC coupled or erroneous results will be obtained.

Step 3)

Measure the maximum voltage (V_{max}), and the minimum voltage (V_{min}) for the cycle. The modulation factor (M) is calculated from the following formula:

$$M = \frac{V_{max} - V_{min}}{V_{max} + V_{min}}$$

See Figure 2.

Step 4)

Repeat Steps 2 and 3 until the lowest modulation factor is found.

Step 5)

Record instrument settings and the lowest modulation factor, expressed as a ratio between 0 and 1.

Step 6)

Repeat the above measurements for 243 MHz.

6.4 Modulation Duty Cycle

Step 1)

Activate the EPIRB.

Step 2)

Trigger the oscilloscope and store at least one complete cycle of the audio waveform.

Step 3)

Measure the period (T) of the waveform. The period is the time difference between the half voltage points at the beginning and end of one cycle of the waveform. See Figure 2.

Step 4)

Measure the pulse width (t_p) of the waveform. The pulse width is the time difference between the half voltage points on the rising and falling portions of the waveform. See Figure 2.

Step 5)

Calculate the duty cycle (D) as follows:

$$D = \frac{t_p}{T}$$

Step 6)

Repeat Steps 2 through 5 a sufficient number of times to determine the highest and lowest duty cycles.

Step 7)

Record instrument settings and the highest and lowest duty cycles in percent.

Step 8)

Repeat steps 1-7 for 243 MHz.

6.5 Sweep Repetition Rate

Step 1)

Connect a speaker to the detected output of the spectrum analyzer or receiver so the audio frequencies are audible. Alternatively, an FM radio tuned to 108 MHz placed in the vicinity of the EPIRB may be used.

Step 2)

Activate the EPIRB.

Step 3)

Time the number of audio sweeps (N) for a one minute interval.

Step 4)

Calculate the audio sweep rate (R) using R = N / 60.

Step 5)

Record instrument settings and the sweep repetition rate in Hertz.

7. SPECTRAL MEASUREMENTS

7.1 Set-up

Spectral measurements are to be performed in a shielded room.

Step 1)

Place the EPIRB directly on a metal ground plane, such as the shielded room floor. The EPIRB should be powered by its own internal battery with its standard antenna attached and deployed.

Step 2)

Place a suitable receiving antenna at a convenient distance from the EPIRB and connect it to the input of the spectrum analyzer to observe the radiated signal from the EPIRB. A signal generator and frequency counter capable of operating at 121.5 and 243 MHz are also required for these tests.

7.2 Occupied Bandwidth Test

Step 1)

Activate the EPIRB and observe the fundamental frequency on a spectrum analyzer. Adjust location of receiving antenna and spectrum analyzer controls to obtain a suitable signal level (i.e., a level which will not overload the spectrum analyzer, but is far enough above the noise floor to allow determination of whether or not the sidebands are attenuated by at least the amount required in the rules).

Step 2)

Set spectrum analyzer controls as follows:

I.F. bandwidth:	10 kHz
Video filter:	OFF or as wide as possible
Scan time:	100 ms./div.
Amplitude scale:	10 dB/div.
Scan width:	20 kHz/div.
Center frequency:	121.5 MHz or the alternate frequency for 121.5 MHz

Step 3)

Record the signal level in dbm.

Step 4)

Calculate the mean power reference level by adding 10 $\log_{10}(D)$, where D is the modulation duty cycle determined in Paragraph 6.4, to the recorded signal level.

Step 5)

Set spectrum analyzer controls as follows:

I.F. bandwidth:	100 Hz
Video filter:	OFF or as wide as possible
Scan time:	10 sec./div.
Amplitude scale:	10 dB/div.
Scan width:	20 kHz/div.

Step 6)

Check the modulation sidebands for compliance with the required attenuation below the mean power reference level specified in Section 80.211 of the Rules.

Step 7)

Record how the test was performed, instrument settings and the occupied bandwidth in kHz and the 3 dB bandwidth of the carrier in Hz. (See paragraph 8)

Step 8)

Repeat steps 1 through 7 for the signal at 243 MHz or the alternate frequency for 243 MHz.

7.3 Signal Enhancement Test

There are two methods for measuring the percentage of total power within a distinct and clearly defined carrier. The first method is to be used only for EPIRBs that have clearly defined sidebands. The second method is to be used for EPIRBs with any other type of sideband structure.

Measurement Method I - Use only with EPIRBs that have clearly defined sidebands.

The setup specified in paragraph 7.1 above is to be used in this method of measuring signal enhancement.

Step 1)

Activate the EPIRB and observe the fundamental frequency at 121.5 MHz on the spectrum analyzer. Adjust the location of the receiving antenna and the spectrum analyzer controls to obtain a suitable signal level (i.e., a level which will not overload the analyzer, but is far enough above the noise floor to allow sidebands at least 40 dB below the carrier to be viewed).

Step 2)

Set the spectrum analyzer controls as follows:

I.F. bandwidth:	100 Hz
Video filter:	OFF or as wide as possible
Scan time:	10 sec./div.
Amplitude scale:	5 dB/div.
Scan width:	2 kHz/div.
Center frequency:	121.5 MHz

Center the carrier component on the display as illustrated in Figure 3. Record the amplitude in dBm of the carrier. In this example, each pair of sidebands appears as a rectangular tier symmetrical about the carrier. Each tier of equal height to the right and left of the carrier corresponds to the upper and lower sidebands of each harmonic of the modulating wave form.

Step 3)

Starting at the right side of the carrier as displayed on the spectrum analyzer, record the amplitude in dB of each sideband tier. Use the maximum amplitude and ignore the slope, if any, that may be on each tier (a slope in each tier may occur if the EPIRB sweep is not linear). In the example shown, each tier corresponds to odd-order sidebands due to the fact that the modulating wave form was a symmetrical square-wave. Repeat the above procedure for the set of sidebands displayed to the left of the carrier. It is not necessary to include sidebands more than 40 dB below the level of the carrier.

Step 4)

Convert each measured sideband to volts (relative) as follows:

$$V_{j,k} = \log_{10}^{-1} \left(\frac{dB_{j,k}}{20} \right)$$

$dB_{j,k}$ = dB level of sideband j,k;
where:
j = harmonic number:1,3,5,...n
k = sideband designator: 1 (upper) or 2 (lower)

Step 5)

Convert the measured carrier level as shown on spectrum analyzer to volts as follows:

$$V_c = \log_{10}^{-1} \left[\frac{dB_c}{20} \right]$$

dB_c = dB level of carrier as displayed on spectrum analyzer

Step 6)

The fractional power level of the carrier relative to total power is computed as follows:

$$\text{Carrier Power} = \frac{V_c^2}{\text{Total Power}}$$

$$\text{Total Power} = V_c^{2+}(V_{1,1}^2+V_{3,1}^{2+\cdots} V_{n,1}^2) + (V_{1,2}^{2+}V_{3,2}^{2+\cdots} V_{n,2}^2)$$

Step 7)

Set the spectrum analyzer controls as follows:

I.F. bandwidth:	10 Hz
Video filter:	OFF or as wide as possible
Scan time:	10 sec./div.
Amplitude scale	2 dB/div.
Scan width:	20 Hz/div.
Center frequency:	121.5 MHz

Set the log reference control/attenuator so that the peak of the carrier is at 0 dB level. The measured 3-dB bandwidth of the carrier must be 60 Hz or less as illustrated in Figure 4 for compliance with the spectral enhancement requirements in Section 80.1053 of the rules.

Step 8)

Record instrument settings, sample calculation and the percent of power within ± 30 Hz at 121.5 MHz or ± 60 Hz at 243 MHz of the carrier frequency.

Step 9)

Repeat the above measurement steps 1 through 8 for 243 MHz. For the higher frequency, the bandwidth in step 7 must be 120 Hz or less for compliance with Section 80.1053 of the rules.

Measurement Method II - Use for all EPIRBs except those with clearly defined sidebands.

Step 1)

Activate the EPIRB and locate the carrier frequency at 121.5 MHz on the spectrum analyzer. Adjust location of receiving antenna and spectrum analyzer controls to obtain a suitable signal level (i.e., a level which will not overload the analyzer, but is far enough above the noise floor to allow sidebands at least 40 dB below the carrier to be viewed).

Step 2)

Set the spectrum analyzer controls as follows:

I.F. bandwidth:	10 kHz
Video filter:	OFF or as wide as possible
Scan time:	100 ms./div.
Amplitude scale:	5 dB/div.
Scan width:	10 kHz/div.
Center frequency:	121.5 MHz

Step 3)

Record the amplitude in dBm.

Step 4)

Calculate the total power output by adding 10 log(D), where D is the modulation duty cycle determined in Paragraph 6.4, to the recorded signal level.

Step 5)

Set the spectrum analyzer controls as follows:

I.F. bandwidth:	60 Hz or less
Video filter:	OFF or as wide as possible
Scan time:	10 sec./div.
Amplitude scale	5 dB/div.
Scan width:	20 Hz/div.
Center frequency:	121.5 MHz

Step 6)

Measure and record the carrier power in dBm as displayed on the spectrum analyzer.

Step 7)

Calculate the ratio of carrier power to total power from steps 4 and 6 using the following formula:

$$\frac{\text{carrier power}}{\text{total power}} = \log_{10}^{-1} \left[\frac{dB_c - dB_T}{10} \right]$$

dB_c = carrier power in step 6
dB_T = total power in step 4

Step 8)

Record instrument settings, sample calculation and the percent of power within 30 Hz at 121.5 MHz or 60 Hz at 243 MHz of the carrier frequency.

Step 9)

Repeat the above measurement steps 1 through 8 for 243 MHz. For the higher frequency, the I.F. bandwidth in step 5 must be 120 Hz or less.

7.4 Carrier Frequency Test

The setup specified in paragraph 7.1 above is to be used in measuring the carrier frequency.

Step 1)

Activate the EPIRB and locate the 121.5 MHz or the alternate frequency for the 121.5 MHz signal on the spectrum analyzer. Adjust location of receiving antenna and spectrum analyzer controls to obtain a suitable signal level.

Step 2)

Set the spectrum analyzer controls as follows:

I.F. bandwidth:	10 Hz
Video filter:	OFF or as wide as possible
Scan time:	10 sec./div.
Amplitude scale:	10 dB/div.
Scan width:	20 Hz/div.
Center frequency:	121.5 MHz or the alternate frequency for 121.5 MHz

Step 3)

Combine the output of the signal generator with the EPIRB signal at the input to the spectrum analyzer.

Step 4)

Adjust amplitude and frequency of signal generator output to determine center of carrier frequency component.

Step 5)

Measure signal generator frequency with frequency counter with accuracy of 5 PPM or better and record as carrier frequency.

Step 6)

If applicable, change the type of modulation of the EPIRB and record the shift in carrier frequency as observed on the spectrum analyzer display.

Step 8)

Record results, instrument settings and the carrier frequency in MHz compared with temperature in C. See paragraph 8. Also, if the type of modulation is changed, record the frequency shift of the carrier frequency in Hz.

Step 7)

Repeat the above measurement steps 1 through 6 for 243 MHz or the alternate frequency for 243 MHz.

SECTION III - DATA RECORDING/REPORTING REQUIREMENTS

8. DATA RECORDING/REPORTING REQUIREMENTS

The test report for an EPIRB shall contain the following information:

1) Specific identification, including the FCC ID, model and serial numbers, of the EPIRB under test.

2) The name and location of the test sites used for the measurements.

3) A description of the instrumentation and equipment, including antennas, used to perform the tests. For purchased equipment, the type, manufacturer and model number are generally sufficient as a description.

4) The test results and associated comparative information.

5) A description of any modifications made to the EUT or other system components during the testing.

6) A description and justification of all deviations from the procedures described herein.

7) The name and qualifications of the person responsible for the tests.

8) The date the tests were performed.

9) A statement signed by the individual responsible for the test that the EPIRB as tested complies or does not comply with the applicable FCC rules.

10) A statement signed by the individual responsible, either directly or indirectly, for production or marketing of the device tested that the unit tested is representative of the equipment that will be marketed.

Figures

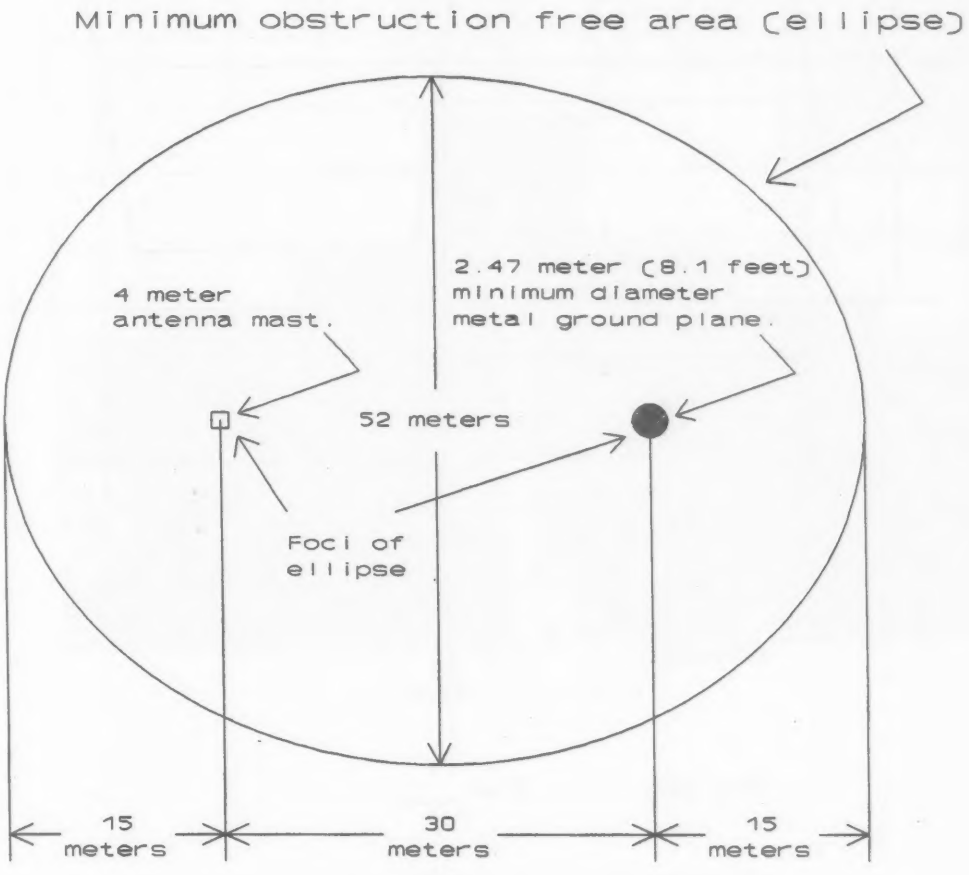
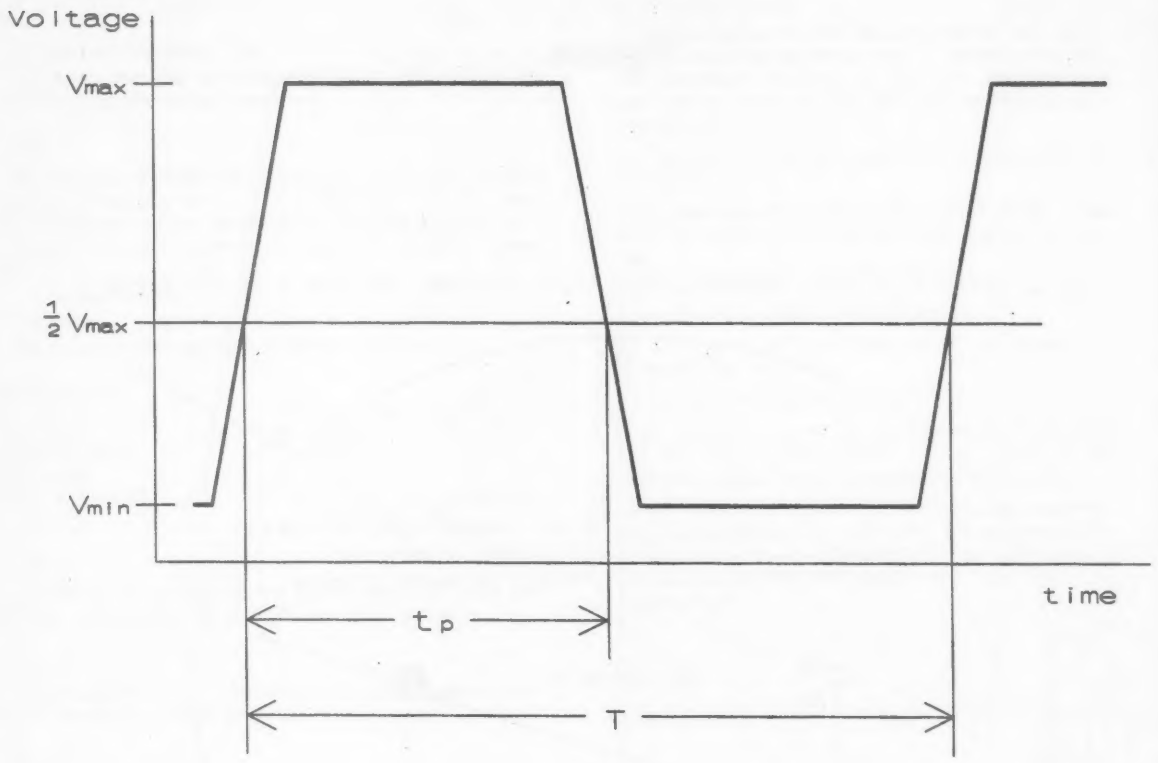


Figure 1 - Measurement Site



Frequency: $f = \frac{1}{T}$

Duty cycle: $D = \frac{t_p}{T}$

Modulation factor: $M = \frac{V_{max} - V_{min}}{V_{max} + V_{min}}$

Figure 2 - Typical Audio Waveform

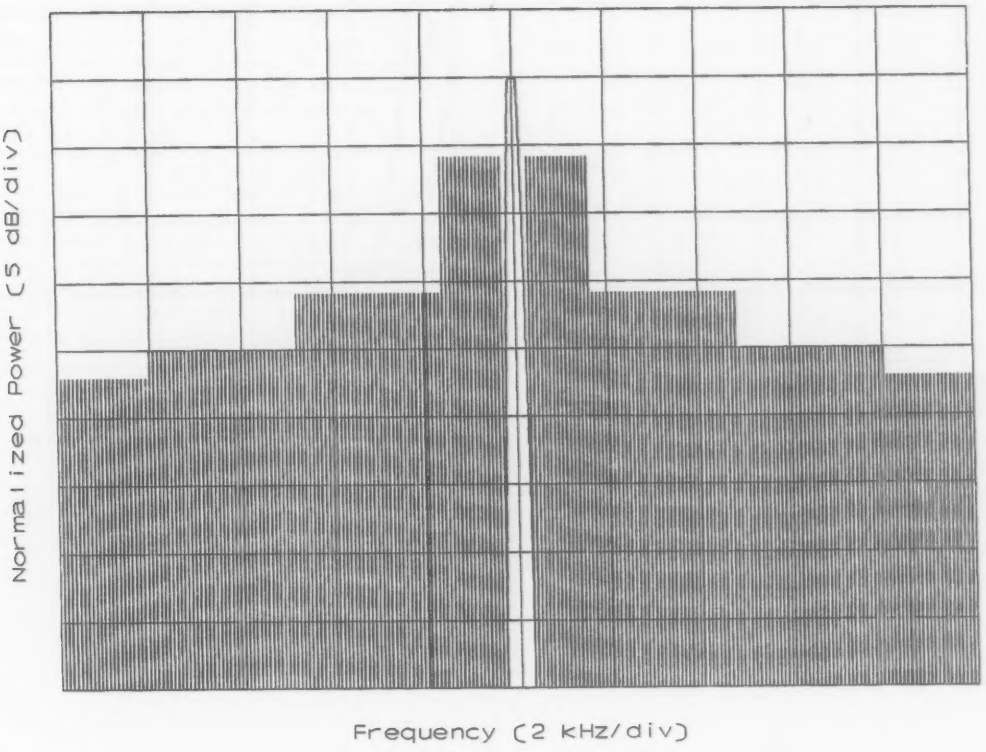


Figure 3 - Example of EPIRB Spectrum

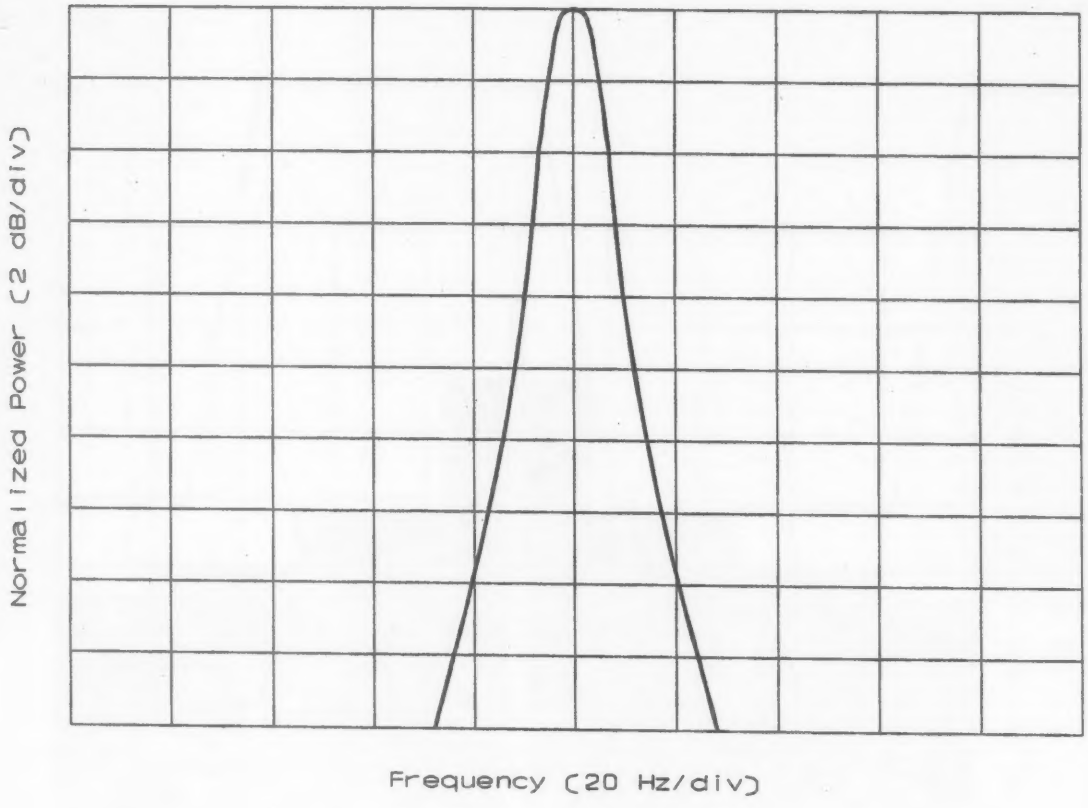


Figure 4 - Example of EPIRB Carrier Component

FOOTNOTES

[1] See the *Notice of Proposed Rule Making* in PR Docket 89-622 which proposes, among other things, to clarify the types of emissions for EPIRBs, to require that EPIRBs comply with the the spectral enchancement rules in Section 80.1053(a) (8) for all types of modulation, to require labelling of EPIRBs which comply with the spectral enchancement rules, delete references in the rules to FAA TSO-91a and RTCM Document DO-183, and to change the measurement distance for radiation with the EPIRB switch in the test position. This action is in respones to a petition for rule making filed by the Radio Technical Commission for Maritime Services (RTCM) on October 25, 1988.

[2] The Commission's rules also provide for operation of Class EPIRBs, which operate on other frequencies, and 406 MHz satellite EPIRBs. The technical standards for these classes of EPIRBs are significantly different from those for Classes A, B, and S, so they will not be addressed in this proceeding.

[3] *See* 47 CFR Section 80.203(a).

[4] PR Docket No. 87-133, 3 FCC Rcd 1027 (1988)

[5] The U.S. Coast Guard requires Class A EPIRBs to be carried aboard certain types of ships.

[6] We are proposing to delete the requirement for use of the RTCA test procedures from the rules in PR Docket 89-622.

[7] *See* 47 CFR Section 80.1061. This rule section references RTCM Paper 215-87/SC 110-89, "RTCM Recommended Standards for 406 MHz Emergency Position Indicating Radiobeacons (EPIRBs)."

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-600

In the Matter of

Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service 37826

NOTICE OF INQUIRY

Adopted: December 12, 1989; Released: December 29, 1989

By the Commission:

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I. Introduction

1. Congress intended the Cable Communications Policy Act of 1984[1] to encourage the growth and development of cable systems that would provide the widest possible diversity of information sources and services to the public. The Cable Act was designed to minimize the economic burdens that unnecessary regulation would otherwise impose on cable operators and to promote competition in cable communications. To accomplish these goals, the Cable Act contains provisions constraining the powers of local, state and federal regulators. In particular, it prohibits rate regulation except as to "basic cable services" where "effective competition" does not exist.

2. In Section 623(h) of the Act, 47 U.S.C. § 543(h), Congress directed the Commission to conduct a study of the cable industry's operations under the Cable Act and, based on that study, to prepare and submit to Congress a report analyzing the effect on the video services marketplace of substituting market forces for cable rate regulation and, if appropriate, to recommend legislation. This "Six Year Report" must be submitted to Congress no later than October 28, 1990. We open this comprehensive inquiry as our first step in preparing that report, which we intend to present to Congress no later than July 31, 1990.[2]

3. In the five years since passage of the Cable Act, we have witnessed major changes in the cable industry, which have dramatically reshaped the video services market on both a local and a national level. According to recent accounts in the trade press, the availability of cable service (as measured by "penetration" of television households) has reportedly grown from 37.3 percent of all television households (or 32 million households) in January of 1985 [3] to 56.4 percent (or 50.9 million) in mid-November of 1989.[4] In this same period, cable has presented its subscribers with many new viewing options. Annual cable investment in programming has doubled from $1 billion to $2 billion between 1984 and 1989.[5] In 1984, 57.4 percent of all cable subscribers were served by

systems with channel capacity exceeding 30 channels;[6] by 1989, 86.8 percent of all cable subscribers were served by systems with such capacity.[7] During this same period, the number of existing or proposed cable services has more than doubled.[8] Particularly dramatic has been the increase in the number of regional sports channels.[9] The increased availability of cable and its enhanced service offerings have led in turn to rising audience shares and revenues for cable systems. Since the end of 1986, when cable rate regulation was largely abolished, annual cable advertising revenues have more than tripled, rising from under $600 million in 1984 to an anticipated $1.96 billion in 1989.[10] Similarly, cable revenues per subscriber per month have increased from $20.01 in 1984 to $30.95 in 1989.[11] Thus, there can be no doubt that the cable industry has prospered under the Cable Act.

4. At the same time, concern has grown about whether cable has begun to abuse its market power in the video services marketplace. There are increasing consumer complaints about high and rising basic cable rates, poor service quality, and the dropping or repositioning of broadcast signals. Television broadcasters echo the last complaint and have also voiced concern about cable operators' ability to offer their own basic channels that compete unfairly with broadcasters for local advertising revenue.[12] Other video service competitors -- such as multichannel multipoint distribution service ("MMDS") companies and distributors of programming to home satellite dish ("HSD") owners -- allege that large, vertically integrated cable operators are denying them access to programs.[13] Some program suppliers assert that they cannot gain access to the cable systems of operators that also produce their own programming.[14] Some program suppliers also complain that rising national concentration in cable system ownership has led to their inability to gain access to large cable systems. Operators of small, independent cable systems and non-cable multichannel video services alike claim that they pay discriminatorily high rates to certain program sources which are under the control or strong influence of large multiple system operators ("MSOs"). The common thread running through all these complaints is that, with the advent of large, multi-system cable owners and their growing control over sources of programming, the cable industry has become so concentrated that it is no longer responsive to the public and can now unfairly impede competitors from offering alternative service to viewers.

A. The General Focus of the Inquiry

5. In this proceeding, we seek to develop a factual record that will enable us to determine the validity of the concerns listed above. We seek hard evidence and empirical analyses of the cable industry conduct and relationships that are the subject of these concerns. The record developed in this proceeding should provide the Commission with a reasonable basis for determining whether, in fact, the cable industry has engaged to a significant degree in the practices with which others have charged it: raising prices; providing poor service; manipulating the carriage of broadcast or other signals; or competing unfairly in the advertising or program acquisition markets.

6. To the extent that this inquiry may demonstrate that participants in the cable industry have indeed engaged in such practices, we invite analyses of the causes and effects of those practices. What is the relevant product market in which those practices occur? How vigorous is the competition within the cable segment of that market? Who are the actual or potential non-cable competitors in that market? What portion of that market is controlled by the cable industry? Does the cable industry's conduct reflect its abuse or accumulation of an undue degree of power in that market?

7. To the extent that concerns about the exercise of undue market power by cable operators appear valid, we invite commenters to suggest responses that will address them. Our goal is to identify those cable practices that constitute an abuse of market power and initiate appropriate curative action to ensure that the public is served in the best, most efficient manner possible. We note that the Commission might undertake or recommend to Congress two distinct types of regulatory response. The first would be to attempt to increase competition to cable service providers (which should lead to an increase in viewer choices) by removing restrictions on competitors to cable, or by taking other similar action to increase competition. The second would be to regulate cable industry practices directly.

8. We continue to believe that in the long term, competitive market forces will best promote the interests of viewers or consumers. We request comment, however, on the extent to which competitive market forces may be prevented from working in local, regional and national cable service and programming markets and, accordingly, the extent to which some degree of at least interim regulatory intervention may be necessary to assure competition in these markets.

9. We note that there are several pending Commission proceedings and petitions that contain information relevant to our inquiry. For this reason, we have decided to terminate the following two proceedings and to make the records developed in each of them a part of the record in this inquiry:[15] (a) RM-5475, the proceeding triggered by the filing of a Petition for Rule Making by SATCOM, Inc., and (b) MM Docket No. 88-138, our Cable Signal Carriage Inquiry. We are also including as part of the record in this proceeding both the INTV petition for inquiry into whether the Commission should exercise its authority under Section 612(g) of the Cable Act to regulate some currently unregulated facets of cable television service[16] and the INTV petition for Rule Making to prevent anti-competitive practices by cable television stations.[17]

10. We recognize that the outcomes of several other ongoing Commission proceedings could affect competition in the local video service markets.[18] While we are not consolidating these proceedings with this inquiry, we invite comment on the extent to which different outcomes in those proceedings could enhance or thwart the development of vigorous competition in the video services marketplace.

B. The Analytical Framework

11. For purposes of framing this inquiry, we are dividing the remaining discussion into three major sections. Section II focuses on local market issues concerning cable market power and competition, particularly with respect to cable rates and service and alternative, non-cable sources of video programming and their access to viewers. Section III focuses on national market issues, such as whether horizontal concentration[19] and vertical integration[20] in the cable industry have allowed operators of large cable systems to manipulate the programming sup-

ply and competitive opportunities of smaller operators and non-cable delivery media. We recognize that local and national issues involve a host of interrelated factors.[21] Accordingly, in Section IV we will highlight and seek comment on the interrelationships among these issues and possible remedies to the problems such relationships can raise.

12. By dividing our discussion into local and national market issues, we do not intend to ignore the complexities involved in this inquiry. For example, we recognize that cable systems may also be viewed as operating in regional markets and that marketplace dynamics on a regional level may differ from those on a national or local level. Accordingly, to the extent that the cable industry's regional behavior raises unique concerns, we invite commenters to address such concerns.

II. Local Competition and Market Power

13. For purposes of this inquiry, a "local market" is defined as one in which cable systems provide service to residential subscribers in a particular geographic location (*e.g.*, a city). We begin with a focus on the local market because individual subscribers are most immediately concerned with the rates and quality of service of the local system, not with the national average. To assess the extent of any problems that may exist, and to evaluate the causes and possible solutions of such problems, we have divided our discussion of "local" issues into four parts.

14. In subsection A, we seek to determine whether, and to what degree, local cable rates and cable service have reached unacceptable levels. So that we may make a reasoned judgment about what should be considered "unacceptable," we raise general questions about the causes of increased rates or service problems. In subsection B, we ask a series of questions to determine whether a local cable system is subject to adequate competitive checks on its ability to raise rates or reduce service to subscribers. More specifically, we seek to identify the types of competitors to cable that we should include in the relevant market for evaluating whether cable can now (or in the future) exercise undue market power to the ultimate detriment of consumers. In conjunction with these questions, we also ask whether there are any reliable measures in economic theory to determine the existence of monopolistic behavior on the part of the cable industry. If, in fact, there is a need for placing local restraints on the cable industry, such restraints can either come from competitors or from direct regulation of the cable industry. In subsection C, we focus on the need for governmental action to increase the possibility of competition in, or with, the provision of local cable service. Finally, in subsection D, we seek comment on the need for imposing direct regulatory restraints, such as rate regulation and anti-trafficking restrictions.

A. Cable Rates and Service

15. At present, cable service rates are generally not subject to governmental regulation. The reason for this lack of regulation stems, in the first instance, from the Cable Act, which generally forbids local or federal governmental authorities from regulating the rates of any cable service except "basic cable service." Even as to basic service, the power to regulate is quite restricted. The Cable Act grants local franchisors the authority to regulate basic service rates only in cases where a cable system is not subject to "effective competition." *See* 47 U.S.C. §§ 543(b)(1), 543(c). The Cable Act mandated that the Commission define the phrase "effective competition." *Id.* Further, the Commission was authorized to establish the parameters of local rate regulation where effective competition is absent.

16. In 1988, in MM Docket No. 84-1296, the Commission determined that a cable system would be considered subject to effective competition, and therefore exempt from local rate regulation, if three or more broadcast television signals are available to the entire geographical area of the cable community (the "three signal" standard).[22] Signal availability is determined on the basis of predicted Grade B contours and "significant viewing" in the cable community. Franchising authorities and others have questioned whether three over-the-air television signals is a sufficient number to provide "effective competition" for local cable systems. The Commission expects to review this issue closely in the near future in a notice of proposed rule making in a new docket. In that new proceeding, we expect to examine in detail whether changes since 1984 in the essential characteristics of "tiered" cable service or other considerations warrant changing the current standard.

17. As a result of the strictures in the Cable Act and the Commission's subsequently adopted definition of "effective competition," basic service rates for all but a few cable systems are generally unregulated.[23] The best information we have at present regarding the effect of such deregulation on rates charged for basic cable service is set forth in a recent survey of cable systems conducted by the General Accounting Office ("GAO").[24] According to the GAO survey, monthly rates for the lowest priced basic service rose 29 percent between December 1, 1986 (three weeks prior to the deregulation of cable rates) and October 31, 1988.[25] The survey also found that cable systems increased the number of channels offered over the same period from 24 to about 30 channels, a 25 percent increase. The Commission and GAO are planning to conduct another expanded rate survey in the winter of 1989-1990 in order to obtain information on rates charged for basic cable service both before and after the GAO study period, as well as other relevant information.[26] Such additional information includes a breakdown by type of broadcast signal or program service carried on the basic service tiers at several different points in time. The expanded survey will also seek information on pay services, discount packages, channel capacity, homes passed, miles of plant and ownership of cable systems.

18. To supplement the data we expect to gather through the joint FCC-GAO survey, we seek in this proceeding additional empirical data on and analysis of changes in cable rates and service quality occurring since the deregulation under the Cable Act took place. In particular, we seek answers to the following questions concerning rates and service changes occurring during this period:

a. How have rates changed since enactment of the Cable Act? How have they changed since the Commission promulgated its current definition of "effective competition"?

b. To the extent that cable rates have risen beyond general inflation levels, why has that happened? Possible explanations include the provision of new services offered by cable systems which consumers value highly, the rising cost of programs, the extension of service to higher cost areas, the sale and resale of cable systems within short periods of time, or artificially low rates prior to the Cable

Act. To what extent has each of these or other factors played a major role in explaining rate increases? If these factors do not fully explain cable rate increases above inflation rates, is it reasonable to conclude that these increases reflect an increase in market power of cable systems in their local service markets? If not, why not?

c. Has the quantity and availability of basic channels,[27] pay or premium channels, pay-per-view channels, and two-way capability[28] increased significantly since 1984? If so, how much? Aside from changes in the number of channels, how have the actual program offerings changed over time?

d. What has been the experience of cable subscribers regarding the "nuts and bolts" service functions performed by cable operators, such as repairs, billing, and the installation or restoration of service? What has been subscribers' experience regarding the technical quality of cable service?[29]

B. Potential Competitors and the Relevant Market

19. To evaluate the meaning of the changes that have occurred in cable rates and service, it is necessary to determine whether there are viable competitors to local cable operators. Even though there may be only one cable system in a given community,[30] cable systems may face competition at the local level because subscribers have alternatives to cable service, and thus cable operators may be nonetheless constrained to some extent in their ability to raise rates and reduce service. Over-the-air television signals available throughout the community of a cable system may act to some degree as a check on the ability of a cable system to exert market power with respect to basic subscriber rates.[31] In addition, of course, other sources of video programs such as "wireless cable,"[32] home satellite receiving antennas or dishes, satellite master antenna systems ("SMATV"), and the sale and rental of pre-recorded video cassettes for use in VCRs, appear to be at least partial substitutes for cable-delivered video services and hence may limit to some degree the market power of cable systems. Eventually, direct broadcast satellite ("DBS") service may also act as a substitute for cable. Local telephone companies are seeking relief in various pending proceedings so that they might also provide video service in the future. However, if close substitutes for cable are in fact unavailable to subscribers in a local community, cable systems in such communities might be considered to possess undue market power.[33] Therefore, we seek comment on the following questions:

a. What viewing choices or delivery systems constitute the relevant product market for analyzing cable's market power at the local level? In particular, which of the video services listed above are properly included in the local cable service market? What is the basis for this conclusion?

b. Should attempts to measure market power in local markets take into account alternative video media (such as those identified above) or only competing cable television systems?

c. To what extent do alternative video media exert competitive pressure on cable rates and services in the local market? Has the existence of MMDS or SMATV resulted in a decrease of local rates?

d. How, and to what extent, has the availability of these video alternatives changed since passage of the Cable Act?

e. To what extent does the *potential* for competing cable television systems or other multichannel video alternatives, as opposed to *actual* competitors, exert competitive pressure on cable rates and services in the local market? In other words, does a local cable operator consider the possibility of future competitive challenges when establishing the rates it will charge or when determining the quality of service it intends to offer?

f. To what extent would the availability of alternative video services or competing cable televison systems spur the development of cable televison services in uncabled or underserved communities (*i.e.*, served by a cable system offering fewer channels than those in comparable areas)?

20. Increases in basic service rates provide some information about whether cable systems can exert market power. Another method by which to measure the existence and extent of market power is to determine whether the cable industry is earning substantial monopoly profits. The accounting profits of a firm are a readily available indicator of profits. Accounting profits, however, may not provide an accurate measure of the presence or absence of monopoly profits. Differences in accounting practices among firms and the variability of profits over the business cycle limit the usefulness of these data.[34] Accounting profits of a cable system vary over time, for example, because a system incurs heavy initial costs that may not be recoverd until well into the franchise term, at which time the system may upgrade, further affecting the system's profits. An alternative measure of profitability is a comparison of a firm's market value (*i.e.*, sales price) to the replacement cost of its physical assets.[35] A sales price of a firm that approximates the cost of replacing all its assets indicates that the firm is operating in a competitive market. If a firm's sales price greatly exceeds the cost of replacing its assets, it may indicate that the firm has substantial market power; its sales price would reflect the monopoly profits that the purchaser of the firm expects to earn. In recent years, many cable systems have been selling at prices which are apparently several times greater than their replacement cost. One 1987 study estimated that cable systems' sales prices were, on average, almost three times the value of their replacement costs.[36] With the foregoing analysis in mind, we seek comment on the following:

a. Is such an analysis an appropriate measure of market power that can be applied in the context of the sales of cable systems?

b. If cable systems generally sell for more than their replacement costs, does this constitute credible evidence that the cable industry is earning above a competitive level of return?

c. We note that one study concluded that, in 1987, non-financial corporations in the U.S. sold, on average, for less than their replacement costs.[37] While, as mentioned above, cable systems apparently sell for much more than their replacement costs, a more revealing juxtaposition may be to compare cable systems to other mass media or communications firms. We therefore request that commenters provide data on the sales price-to-replacement cost ratio in such industries as television and radio broadcasting, MMDS, SMATV and the like.

C. Remedies to Encourage Competitive Alternatives to Cable

21. We ask commenting parties to suggest actions we might take that could increase the possibility of competition between cable systems or the ability of other media or service providers to compete with cable companies, thus reducing any undue market power that cable systems might otherwise attain. The discussion below begins with the franchise process, which may have been inadvertently structured in such a way as to impede competition. Our primary focus in connection with the franchise process is on local, cable-versus-cable competition. We next discuss whether the providers of satellite-delivered services have, or in the future may have, a full and fair opportunity to compete with cable systems for residential subscribers on the local level. We then ask similar questions about "wireless cable" providers. Finally, we conclude this section with a discussion of whether we should take any action to encourage competition between cable systems and other service providers that might also be carried on cable facilities. Thus, we explore the possibility of fashioning some form of "leased access" or "must carry" relief.

1. The Franchise Process

22. Section 621(b)(1) of the Cable Act requires that a firm seeking to construct and operate a cable television system must first obtain a franchise from the state government or its local designate. 47 U.S.C. § 541(b)(1). Section 621(a)(1) allows, but does not require, the franchising authority to grant more than one franchise to serve the same community. 47 U.S.C. § 541(a)(1). In practice, however, most franchising authorities grant a franchise to serve a particular area to only one firm. Accordingly, we seek comment on the following:

a. In which communities are there competing cable systems franchised or authorized to serve at least some of the same customers? How many subscribers are served by competing systems? Why are there so few competing cable systems? Is the number of such competing systems growing or declining? In markets served by only one cable system, would potential entrants consider the construction and operation of a second local cable system an economically viable enterprise if the regulatory obstacles were removed? In what type of markets would such an enterprise seem more viable than in others?

b. Where franchising authorities allow competing cable systems, have such systems lead to consumer benefits, such as lower prices, superior services or more rapid innovation?

c. When communities issue multiple franchises, to what extent does such competitive entry ultimately result in the survival of a single firm and substantial losses by its unsuccessful rival? And how, if at all, are service and price affected by loss of the competitor?

d. To what extent have franchising authorities in communities with competing cable systems allowed or even encouraged such systems to merge or divide their territory? What are the rationales for allowing or encouraging such behavior?.

e. Should the Cable Act be modified to establish structural rules, or to encourage antitrust action, to prevent mergers among cable systems competing in the same local market? Is there a need to amend the Cable Act to discourage or forbid agreements (with or without franchise authority permission) that enable competing cable systems to divide cable service areas and thus avoid competing against each other in localities where two or more systems are authorized?

f. Why have some local authorities chosen not to authorize more competing systems?

23. There are a variety of modifications to the franchise process that could promote competition at the local level. One way to encourage competition would be to increase the number of franchised cable services from which a consumer could choose. Another, not mutually exclusive, is a proposal by the National Telecommunications and Information Administration ("NTIA") to amend the franchise process so that local telephone companies can offer a "video dial tone."[38] In brief, NTIA's proposal recommends eliminating the local cable franchise requirement for video programmers that lease common carrier transmission facilities from local telephone companies.[39] Thus, local competitors to cable could lease access from the local telephone company to transport an alternative multichannel video service to subscribers. According to NTIA, the availability of a common carrier video dial tone would have an immediate competitive effect on existing cable systems, causing them to be more responsive to consumers in terms of quality of service and programming choices, and would result in enhancements to exchange telephone facilities in order to deliver video signals.[40] In connection with possible changes to the franchise process, we request the following information regarding both cable competition among multiple franchised cable systems and NTIA's video dial tone proposal:

a. Do any facets of the local franchising process appear to bar or discourage the establishment of otherwise viable competition?

b. Would it foster competition to repeal the Cable Act provision which requires firms to obtain local franchises before (1) constructing or operating cable TV systems, or (2) providing video programming through a common carrier? Commenters are asked to comment specifically on the franchising process as it relates to NTIA's video dial tone proposal and its analysis of the proposal's competitive effects.

24. In the preceding two paragraphs, we have asked a number of questions about the practice and effect of granting exclusive cable franchises. However, as indicated at the beginning of our discussion of the franchise process, Section 621(a) of the Cable Act states that a franchising authority "may award, in accordance with the provisions of this title, 1 or more franchises within its jurisdiction." According to the legislative history of the Cable Act, this provision "grants to the franchising authority the discretion to determine the number of cable operators to be authorized to provide service in a particular geographic area."[41] In view of this history and the language of the provision:

a. Does the discretion that Section 621(a) provides local franchisors limit the Commission's power to open the market to competing cable systems within a given geographic area? Specifically, what steps can the Commission take under present statutory constraints to encourage the award of multiple local cable franchises?

b. Should the Cable Act be amended to require the awarding of *two* or more competing cable systems?

c. Alternatively, should the franchising process be limited to dealing only with issues regarding traditional local concerns, such as public safety, and ensuring that franchisees pay the full costs of any disruption to the community (*e.g.*, the costs of digging up and repairing streets, and of stringing cables on telephone or electric poles)? In other words, should local cable regulation be limited to the type of regulation that local authorities generally impose on non-regulated industries?

d. If the franchise process were modified to encourage the development of multiple local cable systems, how would Section 621(a)(3) of the Cable Act, 47 U.S.C. § 541(a)(3), affect this goal? Could the important purpose of Section 621(a)(3) -- which is designed to encourage the wiring of an entire community -- be served without imposing wiring requirements on *each individual* system where multiple local cable systems exist or are proposed?

25. We note that court decisions discussing the First Amendment rights of cable operators reflect an ongoing debate as to whether cable television is entitled to the First Amendment protection extended to the print media or whether cable's various attributes permit at least some measure of the additional regulations to which the broadcast media are subject. Some courts have ruled that cable television is entitled to virtually the same First Amendment protection as the print media, thus rejecting the cities' ability to grant exclusive franchises to one operator.[42] While such courts have also found public access requirements inconsistent with cable operators' First Amendment rights,[43] other courts have not.[44] Under the *O' Brien* standard,[45] which allows certain content-neutral limitations on speech, courts have also overturned "state-of-the-art" technical franchising requirements.[46] On the other hand, another court, applying *O' Brien*, held that cities have the right to impose local programming requirements on cable operators.[47] Accordingly, we seek comment on the following questions:

a. Given the breadth of First Amendment rights that some courts have conferred on cable operators, to what extent can cities constitutionally limit entry into the cable service market directly?

b. To what extent can cities lawfully achieve the same result indirectly by imposing on subsequent entrants the same service obligations and other franchise requirements that the first franchise holder bears?

2. Home Satellite Dishes and DBS

26. Competition to cable is also potentially available from two types of space satellite communications systems. First, existing domestic satellite systems, constructed and deployed for the purpose of relaying video programs to broadcast stations and cable systems ("C-Band" satellites), may compete with cable by providing programming that is accessible to residential viewers who have invested in the necessary receiving equipment. These existing satellites, designed principally for use by a relatively limited number of commercial customers, require relatively large and expensive reception equipment. Nevertheless, it is estimated that more than 2,000,000 home satellite dish systems are in use. According to one estimate, 78 scrambled and 69 clear video channels are transmitted from these "C-Band" satellites.[48]

27. The second type of potentially competitive satellite service is the DBS service. The regulations creating this service, which were adopted in 1982, anticipate relatively costly, high powered satellites and relatively small, low-cost receivers.[49] A number of applications to operate DBS satellites have been granted, but none of these satellites is as yet operational. Nevertheless, DBS satellites may become significant competitors in the video distribution marketplace. Under international agreements, some 256 orbit/channel allocations suitable for half-CONUS (continental United States) services are alloted to the United States. Moreover, technical progress has continued and it now appears possible for up to 32 channels of service to be provided to the entire continental United States from a single applicant at a single orbital location.[50] With continuing progress being made in receiver design, it should also now be possible for DBS signals to be received on small flat plate antennas (or "squarials") of dinner plate size, capable of flush mounting against the exterior walls of buildings.

28. Although it may cost several hundred million dollars to commence satellite operations, the cost to provide 32 channels of service to the entire continental United States could still be less than the cost of either wiring a single large television market for cable or even purchasing a single VHF television station in one of the largest television markets. DBS, although with a more limited channel capacity, is already being delivered in Europe and Japan.

29. The possibility of DBS service developing in the near term is thus highly relevant to the competitive video distribution environment. Accordingly, in order to fully analyze the competitive market in which cable is developing, we seek comment on the constraints that may be delaying the development of satellite communications systems as full multichannel competitors to cable. Specifically, we ask the following:

a. Are there technical, economic, and regulatory barriers to such competition?

b. Do these potential competitors suffer from a lack of programming arising from existing ownership and contractual relationships between cable system operators, program delivery networks and program producers? If such relationships restrict access to programming, what should be the regulatory response?

c. How successful has DBS been in Europe and Japan? What are the factors that have allowed DBS to develop more quickly overseas than in the United States?

d. Once DBS enters into competition with cable, what effects can we expect with respect to cable market power? Without governmental intervention, how long is it likely to take before DBS begins to provide meaningful competition to cable?

e. To what extent is the *potential* competition from DBS relevant to the issue of market power in the the cable television field?

3. " Wireless Cable "

30. We recognize that one of the most promising sources of multichannel competition in the local market is MMDS, or "wireless cable," yet at present there are relatively few functioning MMDS systems. It appears that the dearth of these systems is due, in large part, to the complex interplay of various substantive and procedural

rules governing the provision of these services. Rather than address those issues here, we will shortly begin a separate Rule Making proceeding to pinpoint and attempt to resolve the precise problems encountered by these services under the current regulatory regime. We do, however, believe it appropriate to use the proceeding here to examine a few narrow issues concerning the effect of local requirements on the ability of MMDS to compete with cable. Specifically, we seek comment on the following issues:

a. How, if at all, do local requirements impede MMDS development?

b. Are such local requirements consistent with the First Amendment rights of MMDS providers and with the terms and intent of the Cable Act?

c. To what extent is programming available on fair terms to wireless cable operators?[51]

4. Access and Signal Carriage

31. In addition to increasing competition from satellite and wireless cable providers, encouraging competition to cable systems from other programming services that are or can be carried on cable also may reduce any undue market power of cable operators. We have already noted that the availability of over-the-air television signals may act to some degree as a check on a cable system's ability to raise basic subscriber rates. Similarly, to the extent that cable systems have denied access to local broadcast stations and other programmers or have dropped or repositioned certain local signals, the availability of some form of "must carry" relief or the expansion of the right of alternative service providers to lease cable channels (*i.e.*, "leased access" channels) may diminish cable systems' ability to exercise this type of market power. In this section, we will seek to determine the extent to which these problems may exist and whether they have given cable an unfair competitive advantage over local broadcast stations and other potential competitors or have otherwise harmed viewpoint diversity. In addition, we will explore such possible remedies as some form of must carry or leased access relief.

a. Must Carry, Channel Positioning, and Compulsory License

32. Since the enactment of the Cable Act, the U.S. Court of Appeals for the District of Columbia Circuit has twice overturned Commission "must carry" rules requiring cable systems to carry all local or significantly viewed broadcast signals within the capacity limits of the cable system.[52] Subsequently, broadcasters have asserted that cable systems have dropped or repositioned their signals in the absence of these rules. Further, a Commission staff study found that some cable systems had dropped or repositioned some local signals, although many other local signals had been retained even in the absence of these rules.[53] In light of these concerns, we ask commenters to provide information that will enable us to determine whether there is a need for must carry rules in some form.

33. One important facet of the current must carry debate between the broadcast and cable industries is the effect of the retention of cable's "compulsory license" in the absence of must carry rules. In particular, broadcasters protest the asserted inequity that cable systems can presently acquire broadcast programming at governmentally set rates without the permission of program owners, whereas local broadcasters have no guarantee of access to cable systems.

34. In passing the Copyright Act of 1976, Congress determined that the transaction costs of negotiating licenses for cable retransmission would have been unacceptably high under full copyright liability, given cable operators' obligation to retransmit broadcast programming under the must carry rules. Therefore, Congress established the compulsory license, which permits cable operators to retransmit to their subscribers local and distant broadcast signals without first seeking the consent of either the broadcast station or the copyright holders of the programming appearing on that station. In return for importing distant signals, a cable operator remits a royalty payment to the Copyright Office, and there are only minimal royalty payments directly associated with the retransmission of a local signal. Smaller cable systems pay a flat sum for all distant signals imported, while larger systems remit payments based upon a percentage of their gross subscriber revenues. These royalty payments are then disbursed to groups of major copyright holders, which in turn distribute the funds to individual copyright holders. The distribution of payments among the major groups of copyright holders is conducted through mutual agreement of the parties or, failing that, adjudicated before the Copyright Royalty Tribunal.

35. In 1987, the Commission initiated an inquiry seeking information on the advantages and disadvantages of the compulsory license as compared to full copyright liability. In 1989, the Commission recommended that Congress eliminate the compulsory license for cable retransmission of both local and distant broadcast signals, concluding that private negotiations would better serve the public.[54] The report found that consumers would benefit from a market-based pricing and allotment system which could respond to consumer demands more directly and efficiently. Full copyright liability would also redress the imbalance caused by the absence of must carry rules, allowing local stations to reap additional rewards for their productive efforts, but leaving them the flexibility to bargain for carriage with cable systems that have no obligation to retransmit broadcast signals.

36. In light of these concerns, we seek comment on the effects of the absence of must carry rules and the interplay between must carry and the compulsory license, including the following specific questions:

a. To what extent have cable systems deleted or repositioned local signals? Does this behavior reflect the exercise of significant or undue market power? How, if at all, have viewers been affected by such behavior? If a must carry regime were to be reimposed, on what constitutionally sufficient rationale should it be premised?

b. In what ways and to what extent does channel repositioning negatively affect local broadcasters (*e.g.*, loss of advertising revenue)? On what legally sustainable rationale would the Commission be able to regulate channel repositioning, and how could any such regulation be framed to best assure its legal sufficiency?[55] To what extent can cable operators use their ability to reposition local broadcast signals to establish their own programming service on favorable channel locations or otherwise unfairly compete against local stations?

c. In light of the continued existence of cable's compulsory license, to what extent has the lack of must carry rules given cable television systems an unfair competitive advantage vis-a-vis local over-the-air broadcasting stations? What specific problems have or could occur under the current regime?

d. Our report to Congress on the compulsory license also stated that "Should Congress pass new must carry rules that are sustained by the courts, then we would not recommend eliminating the compulsory license for local signals."[56] Do commenters agree with the Commission's position on this issue? Is there any reason for the Commission to modify its position?

37. Our report also noted that local broadcast stations are currently the most popular viewing option, even for cable consumers, with 62.3 percent of viewing in cable households devoted to local broadcast stations.[57] As already noted, the existing compulsory licensing scheme does not directly require cable systems to pay a royalty fee for carriage of local broadcast stations, and there exists no other mechanism for these stations to receive any value their signals may have as a component of a cable system's service offering. Accordingly, we invite comments on the extent to which cable system revenues from subscriber fees may be attributable to the carriage of local broadcast stations and networks. Comments are also invited on whether carriage on such terms has any effect on competition in both the local and national marketplace for audience, video programming and advertising revenues.

38. We also seek comment on whether access to local broadcast signals on such terms has (or will have in the future) any substantial impact on the ability of television broadcast stations to operate in the public interest, convenience and necessity as required by the Act, and on the ability of broadcast networks to maintain a national program service to affiliated stations. If cable systems were required to pay market price for the carriage of local signals, but must carry rules were not reimposed, would cable systems have a tendency to drop the carriage of such signals? We invite comments on any legally viable legislative proposals that may be appropriate, including whether the retransmission consent provision of Section 325(a) of the Act should be amended to apply to carriage of local broadcast stations by cable systems.

39. It should be noted that the D.C. Circuit recently held that the Commission retains "ancillary" jurisdiction over cable. *United Video, Inc. v. FCC*, No. 88-1514 (D.C. Cir. Nov. 17, 1989). How does this affect the Commission's ability to take action with respect to channel repositioning or other problems discussed in this section? Furthermore, Section 625 grants cable operators the right "to take such actions to rearrange a particular service from one service tier to another, or otherwise offer the service, if the rates for all of the service tiers involved in such actions are not subject to regulation under section 623." Although our preliminary view is that Section 625 is not a barrier to channel repositioning requirements, commenters may wish to discuss this provision.

b. Leased Access

40. Sections 612(b)-(f) of the Cable Act (47 U.S.C. §§ 532(b)-(f)) require cable systems in certain circumstances to provide "leased access" channels to unaffiliated entities and to set up a mechanism by which parties denied such access can seek judicial relief and, ultimately, relief from the Commission. We seek comment on the extent to which the leased access mechanism has been employed, and by whom. If leased access has not been widely used, we seek comment on why it has not. Is leased access feasible? Does it serve the interests of consumers? Does it or could it effectively redress some of the competitive problems described above, including the dropping of local signals by cable systems? Is leased access a more or less efficient means of providing diversity and access than more direct regulation of cable concentration and/or vertical integration? If there are defects in the statutory procedure, could they be remedied by the Commission pursuant to its authority to take certain action under Section 612(g)?[58] Is additional legislative action appropriate here to strengthen the leased access mechanism?

41. We also seek comment on whether the specific conditions that "trigger" our discretionary authority under Section 612(g) have been met. (That is, are cable systems with 36 or more channels now available to and subscribed by 70 percent of U.S. households?) Presently, 81.7 percent of *television* households in the United States are reportedly passed by cable and 56.4 percent subscribe.[59] Thus, it appears that 68.9 percent of homes passed subscribe to cable. As of April 1, 1989, 86.8 percent of cable subscribers were reportedly served by systems with a channel capacity of 30 or more.[60] We are particularly interested in knowing how many of those subscribers are served by systems with 36 or more channels, as well as the share of homes passed by such systems, to determine if the requirements for triggering Section 612(g) have been met. If Section 612(g)'s triggering requirements in fact have not been met, is legislative action appropriate to lower those requirements? If and when the triggering requirements are met, what rules should the Commission consider promulgating "to provide diversity of information sources"?

D. Regulatory Options

42. If we ultimately determine that existing market forces generally fail to place adequate restraints on cable rates and service, we must then determine whether the government can or should regulate the cable industry and, if so, how. The following discussion addresses the possibility of imposing two types of direct regulation: (a) regulation of the rates that cable systems charge their subscribers, and (b) regulation over the sale of cable systems. In answering the questions we pose below, commenters should keep in mind that we favor those direct regulations that replicate the results of a more competitive marketplace as closely, and with as minimal an intrusion, as possible.

1. Rate Regulation

43. As noted in paragraph 15, *supra*, the Cable Act only permits cable rates to be regulated where "effective competition" does not exist, and even then only as to basic cable services. Section 623 of the Cable Act establishes the role that the Commission and the franchising authorities are each permitted to play in regulating the rates for the provision of cable service. Under Section 623(b), the Commission is empowered to establish a framework for local rate regulation of basic cable service in circumstances in which a cable system is not subject to effective competition. In this connection, the Commission is instructed to periodically review its actions, taking into account developments in technology, and make appropriate amendments to any regulation it has promulgated

in this regard (Section 623(b)(3)).[61] In addition, Section 623(f)(1) makes it clear that the Cable Act does not prevent the Commission (or any state or franchising authority) from prohibiting discrimination among customers of basic cable service. With these basic parameters in mind, commenters are requested to discuss whether any proposals they make regarding the Commission's regulation of rates would require legislative action.[62]

44. Assuming the Commission either has or will be provided legislative authority to act, it could adopt substantive rules, procedural rules or a combination of both to regulate local cable rates. At present, Section 76.33(b) of the Commission's rules contains only procedural requirements, mandating public notice of any rate setting proceeding, an opportunity for interested parties to participate and a formal statement explaining the basis for any decision. 47 C.F.R. § 76.33(b). Mandatory deadlines for local decision making set by Section 623(d) of the Cable Act can also be used to avoid regulatory lag. Alternatively, the Commission could assist local franchising authorities through accounting standards that would enable those authorities to identify the cable operators' costs and realized rate of return and information collection.[63] The Commission could also assist local authorities by reinstituting and making publicly available the financial reporting system in place prior to 1983.[64] We invite parties to comment on the utility of a financial reporting system of the type in place prior to 1983 and these other options.

45. One mode of rate regulation commonly used for public utilities is rate of return regulation. Use of conventional rate of return regulation raises issues relating to, *inter alia*, rate base calculations, permissible rates of return, depreciation schedules, uniform systems of accounts and financial information reporting systems, debt/equity ratios, cost allocation mechanisms, and intercorporate transaction rules. Conventional rate of return regulation has a number of well known drawbacks that would appear to be equally applicable in the cable television context.[65] This method of regulation is not only administratively cumbersome but, because it interferes with incentives to operate efficiently, may also fail over the long run to assure consumers the lowest reasonable rates for the services to which they subscribe. We seek comment on these tentative conclusions. However, we also request that commenters discuss and analyze any alternative forms of rate control.

46. We also seek comment on the extent to which federal involvement in local cable rate regulation is necessary or desirable. From 1972 until 1976, a Commission rule required franchise authorities to engage in cable television rate oversight. *See Report and Order* in Docket 20681, 60 FCC 2d 672 (1976). From 1976 until the Cable Act became law, such regulation was left to the discretion of the local authority. Under the Cable Act, however, local regulation was either precluded or sharply circumscribed by the procedural standards derived from the statute. As this history suggests, cable rate regulation has been alternatively viewed as entirely a local matter and as one implicating important federal interests. We believe, however, that the better view -- reflected in the Cable Act -- is that cable rate regulation implicates important federal interests. As discussed below, the markets for cable programming are interstate in nature, and actions taken in one community can have significant impact beyond its boundaries.[66] Nevertheless, we seek further comment on the following issues:

a. How should responsibility for rate control be allocated between federal and state regulators to maximize the benefits to all cable subscribers?

b. To what degree can or should the Commission place reasonable limits on the power of local authorities to regulate rates?

2. Trafficking

47. In addition to these general issues concerning the feasibility and desirability of reimposing rate regulation, it may be that certain specific behavior patterns of cable systems explain much of the recent rise in cable rates. For example, it has been alleged that rapid sale and resale of cable systems, which is sometimes referred to by critics as "trafficking," has been responsible for much of the rise in basic rates. Therefore, we request comment on the following:

a. How often have existing cable systems been sold or resold? Is there evidence that firms have been "speculating" on the rapid rise in cable system prices, and, if so, is that activity undesirable (*i.e.*, how, if at all, has that activity affected cable service offerings, prices and quality)?

b. Should restrictions be imposed on the sale and resale of cable systems and, if so, by whom?

c. If such restrictions were imposed, how would they affect the price of cable systems? What impact, if any, would there be on increases in basic cable rates?

d. If such restrictions were imposed, would they tend to slow the rate of innovation or technological change by cable systems?

III. National Concentration, Vertical Integration and Market Power

48. In this section we seek comment on the effects of national cable concentration and vertical integration on the video marketplace. In particular, we will focus on the impact of mergers and acquisitions involving large MSOs with each other (which tends to increase the level of horizontal concentration) and with entities involved in supplying programming (vertical integration). As a first step, we must determine the markets in which these effects are felt. In most respects, cable systems which serve nonoverlapping local areas (the usual case) do not compete against each other in the delivery of programming to television households. [67] Cable systems do, however, participate in national markets for the creation and distribution of video programming, and this participation can influence the nature of competition locally. We address these national markets below, first in terms of horizontal ownership concerns and then in terms of vertical integration issues.

A. Horizontal Concentration

49. Concentration in the share of subscribers served by the largest MSOs may have the potential for creating two negative effects: (a) such concentration may give MSOs an unfair competitive advantage in acquiring interests in programming service providers, which may discourage the

development of those services, and (b) concentration may impede competition between the cable industry and other delivery media for programming. In both cases, there appears to be a national market in which the geographically distinct nature of individual cable systems is of limited relevance. For example, MSO acquisition of programming services may have national effects because these services often deal with a variety of different cable systems and are not inherently bound to distinct geographic areas. Similarly, competition for programming between cable systems and other delivery media may have national effects despite the geographically distinct nature of individual systems, because competing delivery media (both cable and non-cable) obtain programming from national as well as local and regional sources. In both cases, national cable concentration may play a role in determining the variety, cost and source of programming available to viewers across the country. We therefore seek comment on whether these rationales support analyzing geographically distinct cable systems as part of the same national market.

50. To assess the effect of cable concentration on competition for programming, it is also necessary to address the relevant *product* (as opposed to geographic) market. If the product sold to cable systems in a national market is generally cable network programming channels, not individual programs, then it appears that any discussion comparing cable's market participation with that of other media should focus on these entities' relationships with programming services, not program producers. It may be, however, that non-cable entities involved in video distribution through conventional broadcast, satellite, and microwave facilities deal significantly with programmers on an individual program basis rather than with programming services. For example, there appear to be a large number of independent entities competing to acquire individual programs from cable and broadcast networks. Similarly, with respect to certain types of programming such as feature films, the product may be distributed directly on an individualized basis via videocassette rental or purchase. In short, it is appropriate to identify and describe at the outset both the geographic and product markets involved, and we invite comment in this regard.

1. MSO Horizontal Ownership Patterns

51. Much of the analysis that we will undertake in this proceeding will require information concerning the actual degree of horizontal concentration that exists in the cable industry. One recent study notes a trend of increasing MSO concentration and recommends that the Commission initiate an inquiry on this topic.[68] Based on traditional antitrust criteria, however, the level of MSO concentration appears to be low.[69] We seek updated information on the current state of MSO concentration and on the relevance -- in connection with the question of imposing MSO ownership limitations -- of the traditional statistical mechanisms for measuring concentration (*e.g.*, concentration ratios or the Herfindahl-Hirschman Index) and of traditional antitrust criteria for assessing concentration (*e.g.*, the Department of Justice Merger Guidelines).[70]

a. To what extent has the market share of cable subscribers held by the largest cable systems increased? What are the specific patterns of growth over time?[71]

b. To what extent has the market share of cable subscribers held by MSOs other than the largest ones increased? What are the implications of increasing concentration among midsize, as well as large, cable companies?

c. In analyzing MSO ownership patterns, should the Commission take into account the effect on program diversity that a growing concentration of MSO ownership may have? Should the Commission's interest in promoting such diversity transcend traditional antitrust theory?

2. MSO Concentration and its Effect on Programming Services

52. One allegation concerning MSO concentration is that it allows MSOs to impede competition by discouraging the formation of new cable programming services and provides incentives for MSOs to behave in this manner. This is related to a concern that cable MSOs have excess market power (monopsony power) in the program acquisition marketplace. Currently, the largest system owner controls access to 20-25 percent of total U.S. cable subscribers. While this percentage may appear low relative to some other industries, it may be quite significant depending on the subscriber level needed to launch and sustain a cable programming service. We therefore seek general comment regarding this threshold level. In particular, we ask for comment on the following questions:

a. How many subscribers must be "cleared" nationally to permit the success of cable programming services? Would the number of subscribers vary depending upon the type of cable service involved (*e.g.*, advertiser-supported vs. premium; general interest vs. special interest)?[72]

b. Based upon the answer to the preceding question, can a single MSO discourage or prevent the launch of a new cable programming service?

c. Would cooperation among several MSOs be necessary to preclude the success of a new cable service? Would such cooperation be actionable under the antitrust laws? If so, would this be a sufficient check on such possible behavior?

d. How do existing broadcast regulations, such as the broadcast television multiple ownership rules, affect the creation of new programming services competitive with cable programming services?

53. Those who are concerned about the effect of MSO concentration on cable programming services claim that new services must often grant an equity position to MSOs to ensure carriage. The concern is expressed that this type of practice discourages entry and vigorous competition, impacts adversely on diversity of control, and may have undesirable effects on program quality and viewer satisfaction. The alternative claim is that this mechanism may be an efficient way of financing new service providers and sharing the risk of their launch. Under this view, an equity position in a new cable programming service becomes a mechanism for compensating cable operators for assuming some of the risk associated with launching the new service.

a. What have been the actual experiences of would-be entrants in the cable programming service field? Of particular interest would be facts concerning the examples cited in the *INTV Cable Competition Petition*,[73] including

TCI's alleged refusal to carry a new cable news service owned by NBC and TCI's subsequent acquisition of an equity ownership in CNN, a competitive news service.

b. To what extent have cable operators acquired equity ownership in cable programming services through this process?

c. How can we distinguish between anticompetitive refusals to carry a channel and good faith judgments that such a service -- *e.g.*, a fourth movie channel or a third news channel -- is not of significant value to subscribers?

d. What is the effect of subscriber demand for service on cable operators' decisions regarding what channels to carry?

3. Competition for Programming Between the Cable Industry and Other Delivery Media

54. Assuming that it is correct to analyze cable firms as program purchasers operating in a national market, it may also be appropriate to include certain other program purchasers and distributors as participants in this market. As indicated above, cable television currently is subscribed to by 56.4 percent of U.S. television households and is available to 81.7 percent of television households. Certain other media offer access to audiences of that size and more, particularly broadcast television stations. In addition, there are now also roughly 2.5 million HSD antenna receivers in use in the United States. Direct satellite transmissions to HSDs can reach every television household that chooses to purchase an antenna. MMDS and "wireless cable" also offer the possibility of access to large audiences, but at this point coverage is limited since relatively few systems have been constructed.[74] The Commission has also, as indicated above, allocated spectrum for a DBS service in a different portion of the spectrum and granted construction permits to several firms.

55. Each of the above-described delivery media provides existing or potential competition for cable and each may compete with cable systems for programming. However, there have been allegations that cable operators attempt to limit competition by disadvantaging these actual or potential rival multichannel delivery systems as well as other cable systems. According to these assertions, MSOs use their bargaining power with respect to cable programming services to prevent rivals from procuring programming from these services, or to allow such procurement only on unfavorable terms. This potential foreclosure of competitors' access to programming raises a number of questions, such as the following:

a. Do other media, such as television stations, television networks, home satellite dishes, MMDS and, potentially, DBS, compete with cable systems for the purchase of or for access to the same programming services? From the perspective of programming services seeking competitive access to viewers, are MMDS, home satellite dishes, and, potentially, DBS considered to be competitive substitutes for cable? If not, why not?

b. To what extent do cable programming services and other program supply organizations use broadcast television in addition to or as an alternative to cable as a means of access to viewers?[75]

c. If alternative delivery media do not generally compete with cable systems for programming, what are the primary means by which these non-cable entities obtain programming, and should cable TV be considered in a separate national market? In answering these questions, commenters should consider the possibility that both cable systems and other media may in fact obtain programming by a combination of individual program acquisitions, affiliation with programming services and purchase of interests in such services.

d. What is the proper role of exclusivity as a competitive tool in a national market?

e. To what extent do any new programming services operate to promote competition with cable in the national market?

56. In the case of the home satellite dish industry, the Commission has previously found that, in 1988, almost all satellite cable programming was available to dish owners at prices comparable to or below those charged to cable subscribers.[76]

a. What additional information is available concerning the ability of cable MSOs to keep home satellite dish program prices above competitive market levels? What changes have taken place in terms of access and rate levels since the matter was last reviewed?

b. How should the different investments in physical facilities by cable subscribers and dish owners factor into this analysis?

c. How does the likely location of present dish owners, primarily in areas with limited broadcast television alternatives, impact on their demand (*i.e.*, willingness to pay) for satellite programming service and hence on their market prices for programming?

4. Additional Considerations Relating to Multiple System Operator Size

57. In addition to the possibility that large MSOs use their economic presence to make programming access more difficult for competitive media, it is possible that large MSOs create similar difficulties for small cable systems. To the extent MSOs controlling large number of subscribers receive bulk discounts on the programming they purchase, this may give these operators a competitive advantage when they seek to purchase small system operators. Accordingly, we also seek information on whether such advantages are used in an unfair or anticompetitive fashion vis-a-vis smaller cable operators.

58. As has been suggested in paragraph 53, *supra*, MSO size may have certain positive effects, such as promoting the expansion of programming options by providing financing or an opportunity to share risks. In addition, dealing with MSOs may reduce the transactions costs for independent new programming services because MSOs offer carriage on systems that control large numbers of cable subscribers. As an earlier Commission staff report noted:

> Among the areas of possible saving are: market research; program evaluation, procurement, and (possibly) production; billing; and legal services (including dealing with the FCC and local franchising bodies). If systems are close geographically, savings on maintenance and installation are more likely, and it might be feasible to employ specialized personnel for local program origination.[77]

59. The bargaining power of large MSOs may enable them to acquire programming at reduced rates, yet not all such reductions can be attributed to the producer's lower transactions costs. However, even if one assumed that cable operators are monopolists at the local distribution level, economic theory suggests that at least some of their cost reduction will be passed on to subscribers.[78] We therefore seek additional comment on the following:

a. To what extent are there economies associated with large multiple cable system operations, and to what extent do these economies redound to the benefit of consumers?

b. To what extent, if any, may rising national cable concentration benefit consumers rather than harm them? Are any such benefits offset by other factors?

c. To what extent is a rising market share of cable subscribers relevant to the quality of service received by the public?

d. How does concentration in the cable industry affect the rates subscribers pay for premium and non-premium cable services programming?

B. Vertical Integration

60. In the context of this inquiry, vertical integration generally refers to common ownership of cable systems and cable program networks, channels or services, but could include ownership of program producers as well. Vertical relationships between cable system operators and program suppliers raise a number of issues concerning competition between program services and diversity of service available to cable subscribers.

1. MSO Vertical Ownership Patterns

61. As a preliminary matter, we seek information and specific data on the current state of vertical integration in the cable industry and on recent trends. In particular, we request the following information:

a. The number and identity of cable programming services in which MSOs have an ownership interest.[79]

b. The identity of the MSOs that hold interests in cable programming services and the amount and type of such interests.

c. The number of cable subscribers served by each MSO that owns any interest in a cable programming service.

2. Foreclosure of Access to Distribution Channels and Competitive Media

62. In the previous section, we discussed two of the claimed negative effects of horizontal MSO concentration – the threat to the viability of rival cable programming services and denial of programming to rival distribution technologies of all types. Among the claimed positive effects are the promotion of new cable programming services via efficient risk spreading, reduced transactions costs, and improved flow of information regarding subscriber preferences. Vertical integration appears to have a similar potential to create these negative and positive effects.[80] Commenters are requested to address these issues, and in doing so, we request that they distinguish explicitly between behavior that is made possible and encouraged by MSO concentration and that which stems directly from the vertical integration between cable systems and their programming sources.

a. What role does vertical integration in the cable industry play in connection with the creation of new programming services, access to existing programming sources, competition with non-vertically integrated cable and non-cable purchasers of independently produced programming, and responsiveness to subscriber preferences?

b. What has been the specific experience with vertical integration? In particular, have there been instances of discrimination by one vertically-integrated MSO against programming services provided either by competing vertically-integrated MSOs or by programmers not affiliated with MSOs, or other similar situations where access problems have been alleged to be associated with system ownership of programming services?[81]

c. What set of circumstances, if any, would give rise to an inference that an MSO choosing not to carry a program service, or doing so only in exchange for an ownership interest, is acting anticompetitively? To what extent has access been denied where channel capacity is available?

d. How do the compensation mechanisms for cable access and programming differ when systems have ownership interests in programming services and when they do not?

63. It is possible that vertically integrated MSOs might favor their own services on their cable systems. Might they refuse to carry rival services or charge higher prices for those services, and might they also favor their own service to the detriment of local broadcasters? In such cases, the subscribers of the MSOs' systems would suffer because they receive access to a narrower range of programming. This is, at bottom, an empirical issue. For that reason, we ask for data on carriage, or lack thereof, of cable programming services by vertically integrated MSOs.[82]

a. Have vertically integrated MSOs refused to carry rival programming services?

b. Have vertically integrated MSOs discriminated against rival programming services in terms of price?

c. Have vertically integrated MSOs discriminated against rival programming services in terms of channel position?

d. Have vertically integrated MSOs discriminated against rival programming services in terms of promotion?

e. Do the practices and incentives involved in the carriage of vertically integrated services differ depending upon whether the services in question are, at least in part, advertiser supported?[83]

f. Are there contractual relationships between non-vertically integrated cable and program supply firms that create the same incentives as equity ownership, *i.e.*, promotion and profit sharing contractual provisions?

64. Vertical integration could occur with respect to premium channels or with respect to basic services. In the case of movie channels, there is an additional factor that warrants analysis. Movies are generally available to the home video (cassette purchase or rental) market before they appear on movie channels. Subscribers' ability to obtain movies from this alternative source may reduce the incentives of vertically integrated MSOs to undertake any restrictive measures. Concomitantly, this option also could limit the harm suffered by subscribers from such

actions.[84] Accordingly, we seek comment on whether, and in what respects, our vertical integration analysis should differ in connection with services such as movie channels.

65. In summary, then, with respect to vertical integration, we seek comment on the following:

a. The state of vertical integration of cable operators and cable programming services.

b. The extent to which operators favor their own services on systems that they own.

c. The effect of vertical integration (as distinct from MSO concentration) on the number of programming services and the availability of such services to rival delivery systems.

d. The possible benefits in terms of improved information flow and reduced transactions costs that stem from vertical integration.

e. Any other costs and benefits, particularly with respect to consumers, of vertical integration.

C. Possible Remedies to Address Horizontal and Vertical Ownership Issues

66. Various types of horizontal and vertical ownership restrictions have been proposed to combat the problems discussed in the preceding paragraphs. These restrictions include national limits on MSO concentration and direct regulation of vertical integration, either by prohibiting it or by imposing controls on the program distribution practices of vertically integrated MSOs. The leased access provisions discussed above in paragraphs 40-41 may also help to address problems associated with programmers obtaining access to cable system distribution facilities.

67. We first seek comment on what actions might be taken to address problems associated with horizontal ownership concentration. We note that an analogy has been suggested between possible national cable MSO limits and the Commission's broadcast multiple ownership rules.[85] The Commission has considered the question of national limits on cable MSOs before, concluding in 1982 that such limits were unnecessary.[86] Currently there are two proposals to reconsider such limits. In addition to the leased access recommendation described above in paragraphs 40-41, SATCOM has requested that the Commission impose both national and regional MSO ownership limits.[87] There may also be measures less intrusive than ownership limits that would preserve the benefits of size and any associated economies of scale, while minimizing the potential for abuses. One option might be to require cable firms which attain a certain national subscription level to make both distribution channels and programming in which they have a financial interest available on nondiscriminatory terms and conditions to competitors. Another option might be to require cable systems which have market power to offer services on an unbundled basis. Subscribers would have the option of buying packages or "tiers" of services, or purchasing only those viewing choices which they want. These approaches might correct for market distortions, while retaining the benefits of vertical integration. We request comment on these options. We also ask commenters to discuss the following questions:

a. Should rules similar in thrust to the national broadcast multiple ownership rules (which generally limit a single entity to ownership of no more than 12 television stations with an aggregate national audience reach not exceeding twenty-five percent) be applied to cable television systems?

b. What criteria should be used to establish national cable MSO limits? How should any limits account for market power exercised by cable systems on a local level?

c. In view of the fact that cable systems are constrained in many respects from exercising control over the content of the programming they deliver, to what degree do the program diversity goals of imposing ownership limits apply to an analysis of imposing such limits on cable owners?

68. We note that Section 613(c) of the Cable Act states that the Commission "may prescribe rules with respect to the ownership or control of cable systems by persons who own or control other media of mass communications serving the same community served by a cable system." If commenters believe that the Commission should impose ownership restrictions, to what extent is the Commission constrained by Section 613(c)?[88]

69. To what extent, if any, are proposals regarding Commission action with respect to vertical integration or horizontal concentration limited by the restriction in Section 624(f)(1), which prohibits the FCC (among others) from imposing "requirements regarding the provision or content of cable services, except as expressly provided in this title?"[89] We note our tentative view that this section does not affect our authority regarding possible multiple ownership restrictions.

70. We also seek comment on actions that might be taken with respect to vertical integration. In a study prepared for the United States Telephone Association in connection with the Commission's cable-telco cross-ownership proceeding,[90] Shooshan and Jackson advocate requiring that program services delivered by satellite or terrestrial microwave for cable distribution systems also be made available for alternative distribution systems. They also advocate prohibiting any firm with a monopoly franchise for the distribution of video programming to the public from distributing an affiliated program service over its owned facilities.[91] The latter prohibition is similar to the so-called "separations" policy, which has been periodically proposed over the past 15 years.[92] The *INTV 70 - 70 Petition* also proposes regulation of vertical integration. INTV has suggested that the Commission, relying on its authority under Section 612(g), require separation of cable system ownership from editorial control over a larger number of cable channels than is currently required by Section 612(b)(1), 47 U.S.C. § 532(b)(1).[93] We seek comment on how effective each of these measures would be in addressing the "national" problems we have discussed and as to our authority under Section 612(g) to adopt such measures.

71. We invite other proposals designed to prevent the adverse effects on vigorous competition in the national markets that MSO concentration and vertical integration may have. We note that the same access requirements that would protect against abuses of market power arising from cable systems' horizontal concentration would also protect against abuses arising from vertical integration.[94]

IV. Interrelationships of Markets, Market Forces and Competitors

72. While this *Notice* is divided into discrete sections, each dealing with different markets, we do not intend to suggest that these markets are not interrelated. Commenters should address the extent to which action taken to introduce competition in one market might reduce market power in another. For example, commenters who believe that large MSOs may have market power in the programming market should discuss the extent to which the injection of competition at the local level might have the effect of reducing their power in the programming market. Similarly, if vigorous competition in local markets were created, should we be concerned about vertical integration, or would vertical integration in such a situation merely be a means to achieve efficiency in the distribution process?

73. The national market discussion in Section III also separately describes horizontal relationships between two or more cable companies and between cable companies and other types of media outlet companies, and vertical relationships between cable companies and cable program supply or distribution firms. However, by discussing these topics in separate sections, we do not intend to suggest that these markets and issues are not interrelated. This question of interrelationships is especially relevant with respect to the interplay of horizontal market power and vertical activities.

74. For example, commenters who believe that MSOs with a large share of national cable subscribers are able to exert market power in the purchase of programming services or in excluding other cable companies or competing media from the ability to purchase those programs should discuss the extent to which smaller MSOs are or are not able to exert similar market power. Would limiting the national market share of the largest MSOs reduce their incentive and their ability to exert market power in any vertical relationships involving programming services? This particular issue illustrates the interrelationship of *national* horizontal concentration with vertical integration.

75. Some parties are concerned about the ability of MSOs to exert market power in purchasing programming services or excluding other cable systems or competing media from the purchase of those same program services. Concern has also been expressed that large MSOs with ownership interests in cable programming services may use their market power to prevent other cable companies or competing media from purchasing programming services that would compete with the MSOs' own service. In the context of these issues, commenters should consider the extent to which increasing competition and thus decreasing horizontal cable market power at the *local* level would reduce the ability of large MSOs to exert vertical market power in the purchase or control of program services at the *national* level. If problems with the exercise of vertical market power (if they exist) can be averted in this manner, should we then conclude that vertical integration would simply be a means of achieving efficiency in the distribution of programming services with no suggestion that it was being used as a way to establish or maintain horizontal market power? Commenters should also discuss any other interrelationships between the various markets that they believe are relevant to this inquiry.

76. Finally, we note that some parties have predicted a future "convergence" of the different types of firms involved in the video marketplace, whereby firms of one type become involved with endeavors that have typically been regarded as the domain of another type. For example, broadcasters and cable operators are forging new alliances in many markets to provide joint news broadcasts and other services.[95] At the national level, the television networks are seeking to lift the current restrictions on their ownership of cable systems and have already entered the cable programming market.[96] These trends may reflect the growing profitability and market power of the cable industry as it has become more of a programmer than a mere wire into the home. Commenters should address the extent to which such convergence exists or will occur, as well as its effects on the availability of programming to competing delivery media, on the delivery of video services to consumers and on the cable industry in particular. Would increased interaction and partnerships among the video industries help to constrain cable's market power or would it decrease the number of independent competitors in a given market? Similarly, how do the potential benefits of any joint ventures, such as lower prices, enhanced viewpoint diversity, and increased program choices, compare with any potential negative effects? We solicit comment on these issues and the appropriate governmental response, if any, as well as on any other ways that such a future convergence may be relevant to this inquiry.

77. As we have suggested in this *Notice*, cable systems have provided many new programming services valued by viewers. At the same time, however, a variety of questions have been raised concerning the structure and performance of the cable industry in general and certain specific companies in particular. We seek factual information, data and studies which support or refute the various complaints or allegations that have been made. We also seek recommendations for the modification or repeal of existing rules, the imposition of new rules and any specific legislative recommendations which commenters believe will best promote a competitive cable marketplace. In addition to the specific questions we have asked, parties are free to respond with information concerning other issues which they believe are relevant to this proceeding. To make such comments useful, however, we request that they include analysis directly relating any proposed regulatory action to a documented problem and explaining how the regulatory action would alleviate the problem.

PROCEDURAL MATTERS

78. This *Notice of Inquiry* is issued pursuant to authority contained in Sections (4)(i), 4(j), 403, 612(g), 613(c), and 623(h) of the Communications Act of 1934, as amended. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before *March 1, 1990*, and reply comments on or before *April 2, 1990*. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and five copies of all comments, reply comments, and supporting comments. If participants want want each Commissioner to receive a personal copy of their comments, an original plus ten copies must be filed. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply

comments will be available or public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

79. For purposes of this proceeding, because of its relationship to other pending and proposed rule making proceedings, the non-restricted notice and comment *ex parte* rules will be applied. Under these rules, *ex parte* presentations are permitted except during the Sunshine Agenda period. *See generally*, 47 C.F.R. Section 1.1206(a). The Sunshine Agenda Period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission: (1) releases the test of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. 47 C.F.R. Section 1.1202(f). During the Sunshine Agenda period, no presentations, *ex parte* or otherwise are permitted unless specifically requested by the Commission or staff for clarification or adduction of evidence or the resolution of issues in the proceeding. 47 C.F. R. Section 1.1203. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding, or (2) if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. 47 C.F.R. Section 1.1202(b).

Any person who submits a written *ex parte* presentation must provide on the same day it is submitted a copy of same to the Commission's Secretary for inclusion in the public record. Any person who makes an oral *ex parte* presentation that presents data or arguments not already reflected in the person's previously filed written comments, memoranda, or filings in the proceeding must provide on the day of oral presentation a memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. 47 C.F.R. Section 1.1206.

80. Further information on this proceeding may be obtained by contacting David E. Horowitz at (202) 632-7792 or Scott Roberts at (202) 632-6302 in the Mass Media Bureau.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Pub. L. No. 98-549, 98 Stat. 2780, codified in Title VI of the Communications Act of 1934, 47 U.S.C. § 521 *et seq.* [" *Cable Act* "].

[2] Concurrent with this inquiry, the General Accounting Office and the Commission will be conducting a survey of cable systems throughout the United States to gather information about rates, cable services and competitive alternatives.

[3] 57 *Television & Cable Factbook, Cable & Services* at C-374 (1989 ed.) [" *1989 Television & Cable Factbook* "].

[4] *Broadcasting* at 14 (Nov. 13, 1989).

[5] Paul Kagan Associates, Inc., *Cable TV Programming* at 2 (Aug. 31, 1989); *Pay TV Newsletter* at 2 (July 31, 1989).

[6] 52 *Television & Cable Factbook, Cable & Services* at 1726 (1984 ed.) [" *1984 Television & Cable Factbook* "].

[7] *1989 Television & Cable Factbook* at C-375.

[8] A recent source lists 181 domestic existing and proposed pay TV and satellite cable services. *See id.* at C-3. In 1984, the number of existing or proposed cable services totalled 67. *See* 53 *Television & Cable Factbook, Cable & Services* at 166-71 (1985 ed.).

[9] While the *1984 Television & Cable Factbook* lists three regional sports channels as existing at the time, the *1989 Television & Cable Factbook* identifies twenty-four such channels. *See 1984 Television & Cable Factbook* at 195-200; *1989 Television & Cable Factbook* at C-3. Further, the October 23, 1989, edition of *Cablevision* identifies three additional operating regional sports channels.

[10] Paul Kagan Associates, Inc., *Cable TV Advertising* at 3 (April 19, 1989).

[11] Paul Kagan Associates, Inc., *Cable TV Investor* at 9 (Nov. 28, 1988); Paul Kagan Associates, Inc., *Multicast* at 3 (Sept. 18, 1989).

[12] *See, e.g.*, Association of Independent Television Stations, Inc. ("INTV") Petition for Rule Making and Supplemental Statement in Support of Notice of Inquiry (filed Oct. 23, 1989) *["INTV Cable Competition Petition"]*.

[13] *See id.* at 28 (describing court action taken by SMATV operator to gain access to HBO and Cinemax programming services at reasonable rates).

[14] *See id.* at 27 (describing refusal of TCI to carry new cable news service that NBC had attempted to launch).

[15] We intend to take the ministerial actions necessary to accomplish this in separate orders to be released shortly.

[16] INTV Petition for Notice of Inquiry (filed Dec. 21, 1988) *["INTV 70-70 Petition"]*.

[17] *INTV Cable Competition Petition, supra* n.12.

[18] These proceedings include: *Telephone Company-Cable Television Cross-Ownership Rules*, Sections 63.54 - 63.58, CC Docket No. 87-266; *Imposing Syndicated Exclusivity Requirements on Satellite Delivery of Television Broadcast Signals to Home Satellite Earth Station Receivers*, Gen. Docket No. 89-89; *Inquiry into the Need for a Universal Encryption Standard for Satellite Cable Programming*, Gen. Docket No. 89-78; *Review of the Technical and Operational Requirements of Part 76, Cable Television*, MM Docket No. 85-38; *Definition of a Cable Television System*, MM Docket No. 89-35; *Inquiry into the Existence of Discrimination in the Provision of Superstation and Network Station Programming*, Gen. Docket 89-88; *Amendment of the Rules Relating to Program Exclusivity in the Cable and Broadcast Industries*, MM Docket No. 87-24; *Amendment of the Rules Concerning the Fairness Doctrine and Political Cable casting Requirements for Cable Television Systems*, MM Docket No. 83-331; *Amendment of the Rules to Eliminate the Prohibition on Common Ownership of Cable*

Systems and National TV Networks, MM Docket No. 82-434; and *Amendment of the Rules with Respect to the Form and Procedure of Ownership Reporting by Cable Television Systems,* MM Docket No. 84-1297. The record developed in the present proceeding may be considered in one or more of these other proceedings. We advise commenters not to reiterate herein comments submitted in these other proceedings, but rather to address specifically any interrelated issues between this docket and those already pending.

[19] "Horizontal concentration" refers to the share of subscribers accounted for by the largest cable systems. Mergers or acquisitions will tend to increase horizontal concentration.

[20] "Vertical integration" refers to the involvement of cable systems in other links in the video distribution chain, such as program production and supply.

[21] For example, we observe that the conclusions we may ultimately reach concerning issues of cable system ownership of programming sources (which are discussed below as national, vertical integration issues), may turn on our conclusions regarding cable market power at the local level.

[22] *See Report and Order* in MM Docket No. 84-1296, 50 FR 18637 (May 2, 1985) *aff'd in part, rev'd in part sub nom. American Civil Liberties Union v. FCC,* 823 F.2d 1554 (D.C. Cir. 1987), *cert. denied,* 108 S. Ct. 1220 (1988). *See also Second Report and Order* in MM Docket No. 84-1296, 3 FCC Rcd 2617 (1988) (petitions for reconsideration pending).

[23] The National League of Cities (NLC) states that rate regulation is prohibited in more than 99 percent of its direct member cities. *See* NLC Comments in MM Docket No. 84-1296, at 3 (filed Dec. 4, 1987).

[24] *See* General Accounting Office, *Telecommunications: National Survey of Cable Television Rates and Services,* Report to the Chairman, Subcommittee on Telecommunications and Finance, Committee on Energy and Commerce, House of Representatives (Aug. 3, 1989). This survey was sent to 1,950 systems, representing approximately 25% of all cable systems.

[25] During this period, the nation's overall price level rose by about six percent. *Id.* at 2.

[26] The FCC is joining the GAO in this effort in order to obtain information that can be used in the Commission's report to Congress on the status of the cable industry, as mandated by the Cable Act.

[27] The GAO report indicates that, from December 1986 to October 1988, there was an average increase of six channels on the lowest-priced basic service tier.

[28] "Two-way capability" refers to interactive services offered by cable systems. For example, services that can be provided on this basis include home shopping, banking and polling services.

[29] In a separate proceeding, the Commission is reviewing the extent to which it should mandate, or allow municipalities to mandate, technical standards for cable systems. *See Further Notice of Proposed Rule Making* in MM Docket No. 85-38, 3 FCC Rcd 5966 (1988). That *Further Notice* was initiated as a response to a ruling by the U.S. Court of Appeals for the District of Columbia Circuit in *City of New York v. FCC,* 814 F.2d 720 (1987), *aff'd on other grounds,* 108 S. Ct. 1637 (1988). The court of appeals ruling vacated the portion of the Commission's decision in the *Report and Order* in MM Docket No. 85-38, 102 FCC 2d 1372 (1985), that pre-empted state and local technical regulation of Class II, III and IV cable channels and remanded the issue to the Commission for further proceedings. The court directed the Commission to consider the propriety of its preemption of cable technical standards for these classes of cable channels in light of the franchise renewal provisions of the Cable Act.

[30] A small number of communities have two competing cable systems. According to trade press reports, about 40 communities are at least partially served by more than one cable system and more than 50 additional communities have franchised potential competitors.

[31] *See Implementation of the Cable Communications Policy Act of 1984, (Second Report and Order)* in MM Docket No. 84-1296, FCC 88-128 (released April 29, 1988).

[32] We use the term "wireless cable" to describe those over-the-air video service systems operating at microwave frequencies that are created by combining one or more microwave transmitters of licensees in the Multipoint Distribution Service ("MDS"), the Multichannel Multipoint Distribution Service, the Instructional Television Fixed Service, and the Operational Fixed Service. We use this term here because of its widespread use in the industry. We do not mean to suggest that these services, which may or may not compete with cable, are themselves cable systems in any regulatory or statutory sense of the term.

[33] *See* generally J.D. Levyand F.O. Setzer, *Measurement of Concentration in Home Video Markets,* FCC, Office of Plans and Policy (Dec. 23, 1982); National Telecommunications and Information Administration, NTIA *Telecom 2000: Charting the Course for a New Century,* Part 1 ch. 8, and Part 2 chs. 11-14 (Oct. 1988) *["NTIA Telecom 2000"].*

[34] For a general discussion of the limitations of accounting profits to diagnose market power, see F. Fisher and J. McGowan, "On the Misuse of Accounting Rates of Return to Infer Monopoly Profits," 73 *American Economic Review* at 82-97 (March 1983).

[35] The resulting ratio, known as the "q ratio," is considered by economists to be a superior indicator of excess profits and, therefore, market power. This is so, in part, because market value reflects a firm's expected future profits, while accounting rates of return measure only past profits. Furthermore, replacement value of assets is less sensitive to inflation than "book" value, which is used to determine the accounting rate of return. However, the replacement cost of a firm's assets often excludes any measure of the firm's intangible assets *(e.g.,* good will and trademarks). For use of the "q ratio" as an indicator of market power, see E. Lindenberg and S. Ross, "Tobin's 'q' Ratio and Industrial Organization," 54 *Journal of Business* at 1-32 (Jan. 1981). *See* also M.A. Salinger, "Tobin's 'q', Unionization, and the Concentration-Profits Relationship," 15 *Rand Journal of Economics* at 159-70 (Summer 1984); M. Smirlock, T. Gilligan, and W. Marshall, "Tobin's 'q', and the Structure-Performance Relationship," 74 *American Economic Review* at 1051-60 (Dec. 1984); M. Hirschey, "Market Structure and Market Value," 58 *Journal of Business* at 89-98 (Jan. 1985); and H. McFarland, "Did Railroad Deregulation Lead to Monopoly Pricing? An Application of 'q'," 60 *Journal* of *Business* at 385-400 (July 1987).

[36] *See* Shooshan and Jackson, Inc., "Opening the Broadband Gateway: The Need for Telephone Company Entry into the Video Services Marketplace" (Oct. 1987).

[37] *See id.* at 14, *citing* L.H. Summers, "Stock Prices, Inflation and q," (Harvard University, updated Oct. 1987). "Non-financial" corporations refer to all industries except such firms as banks and insurance companies.

[38] National Telecommunications and Information Administration, *Video Program Distribution and Cable Television Current Policy Issues and Recommendations* at 3 (June 1988) *["NTIA Report"].*

[39] More specifically, the NTIA "video dial tone" proposal entails: (1) relaxing the strictures on common carriers to allow the transmission of television video services (but not allowing

such common carriers to supply program content), and (2) facilitating local telephone company provision of such transport to others (regardless of whether they have a local cable franchise).

[40] NTIA *Report* at 35.

[41] H.R. Rep. No. 934, 98th Cong., 2d Sess. at 59 (1984).

[42] *Preferred Communications, Inc. v. City of Los Angeles*, 754 F.2d 1396 (9th Cir. 1985), *aff'd on narrower grounds*, 476 U.S. 488 (1986); *Century Federal, Inc. v. City of Palo Alto*, 648 F. Supp. 1465, 1477 (N.D. Cal. 1986), *appeal dismissed*, 108 S. Ct. 1002 (1988) [" *Century Federal II* "]; *Group W Cable v. City of Santa Cruz*, 669 F. Supp. 954 (N.D. Cal. 1987) [" *Group W* "]; *Pacific West Cable Co. v. City of Sacramento*, 672 F. Supp. 1322 (E.D. Cal. 1987).

[43] *Century Federal, Inc. v. City of Palo Alto*, No. C-85-2168 EFL, slip op. at 8-9 (N.D. Cal. 1987) [" *Century Federal III* "]; *Group W*, *supra* n.42.

[44] *See, e.g., Erie Telecommunications, Inc. v. City of Erie*, 659 F. Supp. 580 (W.D. Pa. 1987), *aff'd on other grounds*, 853 F.2d 1084 (3d Cir. 1988).

[45] First articulated by the Supreme Court in *United States v. O' Brien*, 391 U.S. 367 (1988), the test identifies four conditions that the government must meet to justify imposing content neutral regulations on speech (or the provision of video programming): (1) the regulation must be within the constitutional power of the government; (2) it must further an important or substantial government interest that (3) is unrelated to the suppression of free expression; and (4) "the incidental restrictions on first amendment freedoms [must be] no greater than is essential to the furtherance of that interest." *Id.* at 377.

[46] *Century Federal III*, *supra* n.43; *Group W*, *supra* n.42.

[47] *Chicago Cable Communications v. Chicago Cable Comm' n*, 879 F.2d 1540 (7th Cir. 1989).

[48] *See* Comments of Hughes Communications Galaxy, Inc., in Docket 89-355, (filed Oct. 13, 1989). We note that some video signals are also carried on Ku-band satellites.

[49] *See Direct Broadcast Satellite Service*, 90 FCC 2d 676 (1982).

[50] *See, e.g., Continental Satellite Corporation*, 4 FCC Rcd 6292 (1989).

[51] *See infra* ¶ 55.

[52] *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986) *["Quincy"]*; *Century Communications Corp. v. FCC*, 835 F.2d 292 (D.C. Cir.), *clarified*, 837 F.2d 517 (D.C. Cir. 1987), *cert. denied*, 108 S. Ct. 2014 (1988) *["Century"]*.

[53] *See* FCC, Mass Media Bureau, Policy and Rules Division, Staff Report, *Cable System Broadcast Signal Carriage Report (Sept. 1, 1988)*.

[54] *Report on the Compulsory License for Cable Retransmission* in Gen. Docket No. 87-25, 4 FCC Rcd 6562 (1989).

[55] We note that in *Amendment of Part 76 of the Commission's Rules Concerning Carriage of Television Broadcast Signals by Cable Television Systems* in MM Docket No. 85-349, the FCC eliminated its on-channel positioning requirement. 1 FCC Rcd 864, 889 (1986).

[56] *See supra* n.54.

[57] *See id., citing* Cable Advertising Bureau, *Cable TV Facts* at 11 (1988).

[58] In this regard, we note that the INTV 70-70 *Petition*, *supra* n.16, requested that the Commission initiate an inquiry pursuant to Section 612(g) to consider whether it should promulgate any additional rules to provide diversity of information sources on cable television systems. Based on its authority under that Section 612(g) of the Cable Act, the Commission may take further action when cable penetration reaches a certain threshold. Section 612(g) of the Act states that:

> . . . [A]t such time as cable systems with 36 or more activated channels are available to 70 percent of households within the United States and are subscribed to by 70 percent of the households to which such systems are available, the Commission may promulgate any additional rules necessary to provide diversity of information sources. 47 U.S.C. § 532(g).K

INTV claims that threshold has now been or is about to be met and, therefore, requests that the Commission act on their petition. We have incorporated INTV's petition into the instant proceeding and request comment on its proposals.

[59] *See supra* n.4.

[60] 1989 *Television & Cable Factbook* at C-375.

[61] As noted above, the Commission intends to open a new docket to determine if the three signal standard for effective competition is still appropriate and valid.

[62] The leading case in this area is *American Civil Liberties Union v. FCC*, 823 F.2d 1554 (D.C. Cir. 1987), *cert. denied*, 108 S. Ct. 1220 (1988). Commenters should discuss any limitations that that case might place on implementing proposals regarding Commission rate regulation.

[63] Prior to cable deregulation, the Commission had considered creating a uniform reporting and accounting system for cable television systems. *Report and Order* in Docket 20681, 60 FCC 2d 672 (1976).

[64] Under this system, cable systems were required to submit forms providing the Commission with financial information concerning the following: operating revenues and expenses, payments made to cable program suppliers, depreciation, amortization, other income, current assets, fixed assets, other assets, current liabilities, deferred credits, long term debt and owner's equity. *See Report and Order* in Docket 82-528, FCC 83-365 (1985).

[65] *See Report and Order* and *Second Notice of Proposed Rule Making in* CC Docket No. 87-313, 4 FCC Rcd 2873 (1989).

[66] *See infra* ¶¶ 48-49, 72-76.

[67] For an examination of issues regarding the competitive make-up of the national market of home video services, *see Measurement of Concentration in Home Video Markets and NTIA Telecom 2000*, *supra* n.33.

[68] NTIA *Report* at 88. In addition, we observe that in 1989, the top four firms controlled cable systems serving about 43 percent of all subscribers, compared to 28 percent in 1983. The 1989 figure is from a staff analysis using data contained in the December 11, 1989 issue of *Broadcasting* at pages 14 and 42. The 1983 data is from the NTIA *Report*, Appendix C, Attachment 2, at 10.

[69] *See* 1982 Department of Justice Merger Guidelines, 47 FR 28493 (June 30, 1982); 1984 Department of Justice Guidelines, 49 FR 26823 (June 29, 1984).

[70] We note that certain statistical measures -- such as the "q ratio" described in note 35 *supra* -- may reflect local and national market power, as well as various other factors. Depending on the type of statistical evaluation we employ, a breakdown between local and national market power may therefore be irrelevant.

[71] As noted earlier, we will be sending requests to each of the nine largest MSOs for information related to horizontal concentration and vertical integration and their specific ownership

information. Similar information relating to other large multiple system owners would also be of interest in the context of this proceeding.

[72] For example, a recent report suggest that the proposed *HA !* comedy network requires access to 25 million subscribers to break even. *Variety* at 50 (Dec. 13, 1989).

[73] *See supra* n.12.

[74] *See supra* ¶ 30.

[75] In this regard, we note that the line may not always be clear between cable and non-cable programming, and that certain "network" suppliers (Christian Broadcasting Network, Home Shopping Network, Univision, Cable News Network) provide programming for both cable and broadcast affiliates, that "cable programming" is being syndicated for broadcast use, and that "syndicated" programming is appearing on local cable channels and cable networks. "Hollywood" studios produce programming for both cable and broadcast use and have interlocking ownership relationships with both broadcast and cable firms. In addition, some programming acquired for broadcast station use is simultaneously acquired for exposure to cable audiences, *i.e.*, programming acquired by "superstations" such as WTBS and WGN on an exclusive national or non-exclusive basis. Cable and broadcasting, of course, actively compete for sports and feature film programming.

[76] *Second Report*, 3 FCC Rcd 1202 (1988); *see also* Gen. Docket No. 89-88 (comparing rates charged to cable operators and those charged to earth station distributors).

[77] K. Gordon, J. Levy and R. Preece, FCC, Office of Plans and Policy, *FCC Policy on Cable Ownership* at 103 (1981).

[78] Substantial MSO bargaining power may at the same time reduce incentives to enter the cable programming service business.

[79] As indicated previously, information concerning the interests of the nine largest MSOs in programming services is being specifically requested from them.

[80] For a discussion of the theory of vertical integration and its positive and negative effects, see F.M. Scherer, *Industrial Market Structure and Economic Performance*, ch. 10 (2d ed. 1980); R. Bork, *The Antitrust Paradox* at 225-38 (1978); Halvorsen, *An Overview of Legal and Economic Issues and the Relevance of the Department of Justice's Vertical Merger Guidelines*, 52 Antitrust L. J. 49 (1983); Hibsen, *Antitrust Consideration of Joint Ventures, Teaming Agreements, Co - Production, and Leader - Follower Agreements*, 51 Antitrust L.J. 705 (1982); Posner, *Antitrust Policy and the Supreme Court: An Analysis of Restricted Distribution, Horizontal Merger, and Potential Competition Decisions*, 75 Columbia L. Rev. 282 (1975).

[81] For examples, see the allegations in *Viacom International Inc. v. Time Inc.*, Civil Action File No. 89-3139 (S.D.N.Y., filed May 9, 1989), and in *Cable News Network v. Satellite News Channel*, Civil Action File No. C83-430A (N.D. Ga., filed March 3, 1983).

[82] We note that analyses of this nature appear in the NTIA *Report* and in B. Klein, "The Competitive Consequences of Vertical Integration in the Cable Industry" (June 1989). We invite comment on and critique of these and any other existing studies of vertical integration in cable television.

[83] We seek comment, supported by specific data, on the evolution of the cable industry's advertising efforts and practices.

[84] VCRs are widely used, with a current penetration of about 64 percent. *See* Nielsen Media Research, *Nielsen Report on Television* 1989, at 11 (1989). Also, "movie channels" show more than just movies and some of their other programming may not be available on home videos *(e.g.*, live sports, concerts).

[85] *NTIA Report* at ii. The Report specifically recommends that the Commission "initiate an inquiry to evaluate the effect of cable ownership on diversity."

[86] *See Report and Order* in Docket No. 18891, 91 FCC 2d 46 (1982).

[87] *See* SATCOM, Inc., Petition for Rule Making at 20-23, 27-28, filed in RM-5475 (filed Feb. 21, 1986). The attention of commenters is also directed to the comments and reply comments filed in response to the SATCOM Petition.

[88] *See* Comments of TCI filed in response to RM-5475.

[89] Commenters should note the court's interpretation of this language in *United Video, Inc. v. FCC*, No. 88-1514, slip op. at 26-31 (D.C. Cir. Nov. 17, 1989) (upholding Commission's syndicated exclusivity rules as consistent with Section 624(f)(1)). Once cable systems with 36 or more activated channels are available to 70 percent of households within the United States and are subscribed to by 70 percent of the households to which such systems are available, Section 612(g) of the Cable Act would authorize the Commission to promulgate any additional rules necessary to provide diversity of information sources. Assuming satisfaction of the statutorily prescribed conditions precedent to valid action under Section 612(g), this section would also apppear to authorize Commission action, including adoption of cross-ownership rules, designed to protect diversity of information sources. We request that commenters discussing the effect of Section 624(f)(1) on the Commission's authority to promulgate cross-ownership restrictions on cable operators also discuss whether this section's effect is changed if the Commission were to promulgate cross-ownership rules under its Section 612(g) rather than its Section 613(c) authority.

[90] CC Docket No. 87-266.

[91] Shooshan and Jackson, "Opening the Broadband Gateway: The Need for Telephone Company Entry into the Video Services Marketplace," prepared for the United States Telephone Association, at 30-33 (Oct. 1987).

[92] *See supra* n.77 (FCC *Policy on Cable Ownership* at 127-40, and references therein).

[93] *See supra* n.16 (INTV 70-70 *Petition*, App. at 10-13).

[94] *See, e.g., supra* ¶¶ 54-56.

[95] *See Wall Street Journal* at B1 (Sept. 28, 1989). For example, NBC Cable and Cablevision Systems Corp., a large cable operator based in Woodbury, New York, recently formed a joint venture to operate New 12 Long Island, a 24-hour local news channel that reaches 575,000 homes. In addition, WWL-TV in New Orleans has begun a news channel on a local cable system owned by a subsidiary of Cox Cable Communications. *Id.*

[96] For example, one of the major broadcast networks (ABC) holds an interest in ESPN, a cable sports programming service.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-422

In re Applications of

RADIO DELAWARE, INC. — File No. BPCT-870604MB

ADAMS BROADCASTING CORPORATION — File No. BPCT-870615MO

For Construction Permit
for a New FM Station
Delaware, Ohio

ORDER

Adopted: January 3, 1990; Released: January 18, 1990

By the Review Board: MARINO (Chairman), BLUMENTHAL, ESBENSEN.

1. Radio Delaware, Inc. filed a "Motion for Clarification" on December 20, 1989. An "Opposition" to that motion was filed December 28, 1989 by Adams Broadcasting Corporation. These pleadings relate to the Board's recent remand of this proceeding on an issue to determine whether Adams Broadcasting had reasonable assurance of the "Gosnell" transmitter site that it claims it originally intended to specify in its application, and on a related financial certification question. *Radio Delaware, Inc.*, FCC 89R-78, released December 20, 1989.

2. Radio Delaware now seeks addition of a similar issue concerning the transmitter site that Adams Broadcasting, through "inadvertence," actually specified in its original application and upon which it currently relies. We will dismiss the motion as an unauthorized request for reconsideration of our remand order, pursuant to Section 1.291(c)(3) of the Rules, 47 CFR § 1.291(c)(3). *See Alden Communications Corp.*, 103 FCC 2d 1 (Rev. Bd. 1986). Moreover, clarification of existing issues properly lies in the first instance with the presiding ALJ (*id.*).

3. ACCORDINGLY, IT IS ORDERED, That the Motion for Clarification filed December 20, 1989 by Radio Delaware, Inc. IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-580

In re Applications of

SAFE BROADCASTING CORPORATION — File No. BPH-871022MC

TRI-STATE BROADCASTING COMPANY — File No. BPH-871023MJ

For Construction Permit for a
New FM Station on Channel 239A
in Trion, Georgia

Appearances

Robert S. Stone, on behalf of Safe Broadcasting Corporation; *Dennis J. Kelly*, on behalf of Tri-State Broadcasting Company; and *Paulette Laden*, on behalf of the Chief, Mass Media Bureau.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOSEPH CHACHKIN

Issued: January 10, 1990; Released: January 18, 1990

PRELIMINARY

1. This proceeding involves two mutually exclusive applications for a new commercial FM radio station to serve the community of Trion, Georgia on FM Channel 239A. The two competing applicants are Safe Broadcasting Corporation (Safe) and Tri-State Broadcasting Company (Tri-State). A total of five applications were originally designated for hearing by the Chief, Audio Services Division. *Boyce Dooley (Hearing Designation Order)*, DA 88-1919, released January 17, 1989, 54 Fed. Reg. 3138 (published January 23, 1989) (HDO). Of those, Safe, Tri-State and Boyce Dooley filed notices of appearance. Subsequently, at Boyce Dooley's request, the Presiding Judge dismissed his application. *Order*, FCC 89M-934, released March 23, 1989. The two applicants who had not filed notices of appearance, Faith Broadcasting and Lynn S. Gwyn were also dismissed by *Order*, FCC 89M-744, released March 9, 1989 and *Order*, FCC 89M-669, released March 1, 1989, respectively. With respect to Safe and Tri-State, the HDO designated the following issues:

> To determine which of the proposals would, on a comparative basis, best serve the public interest.
>
> To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

2. The HDO also indicated that because of the apparent differences in the areas and populations to be served by the applicants, the areas and populations which would receive FM service of 1 mV/m or greater intensity together with the availability of other primary aural services in such areas, would be considered under the standard comparative issue. This question was mooted by the parties' joint stipulation that there would be no significant differences in their respective areas and populations (Joint Ex. 1).

3. Hearing sessions were held on July 5, 1989 at the offices of the Commission in Washington, D.C., following which the record was closed (Tr. 107). The parties filed Proposed Findings and Conclusions on September 8, 1989, and replies on September 22, 1989.

Findings Of Fact
Safe Broadcasting Corporation (Safe)

4. Safe is a Georgia corporation organized for the purpose of engaging in the establishment, maintenance and operation of radio broadcasting facilities. The corporation is organized for profit and is authorized to issue 5,000 shares of common voting stock having a par value of $1.00 per share. The corporation is not authorized to issue any other shares, voting or non-voting (Safe Ex. 1, p. 1).

5. Terry R. Adams, 499 Walnut Street, Summerville, Georgia, is President, Treasurer, Director and 100 percent shareholder of Safe (owner of 5,000 shares). Cheryl Adams, 499 Walnut Street, Summerville, Georgia is Vice-President, Secretary and Director of Safe, but is not a shareholder. Terry R. Adams and Cheryl Adams are husband and wife (*Id.*).

Diversification

6. Safe is licensee of WSAF(AM), a daytime-only AM station licensed to Trion, Georgia. Mr. Adams is general manager of that station, and is assisted by Cheryl Adams on an as-needed basis. Other than WSAF(AM), neither Safe, Terry Adams nor Cheryl Adams have any interest or connection with other braodcast stations or mass media outlets (Safe Ex. 2, p. 1). In the event that Safe's application in this proceeding is granted, Safe, Terry Adams and Cheryl Adams will divest their interests in WSAF(AM) prior to the time that the new FM station commences program tests (Safe Ex. 2, p. 1).

Integration

7. Terry Adams proposes to be the general manager of the proposed FM station, devoting full-time, a minimum of 40 hours per week to his duties. His duties will include ultimate responsibility for and direct oversight and supervision of all day-to-day operations of the station, including financing. He will be directly responsible for hiring, firing and supervising all station personnel. He will personally formulate and implement all station policy regarding programming, sales, engineering, public affairs, community service and employment practices (Safe Ex. 3, p. 1). Terry Adams proposes to withdraw from all employment at WSAF, and will hold no other outside employment, in order to work at the proposed FM station in the event Safe's application is granted (*Id.*).

8. At the time of the hearing in this case, Mr. Adams was 33 years old, and had lived within the primary service area of the proposed Trion station his whole life (Safe Ex. 3, p. 1; Tr. 104). He was born in the Trion Hospital and lived on Pine Street in Trion until age 5 (Tr. 104-105); he also resided in Trion between 1983 and 1987 at 755 Oak Hill Drive and 38 Moore Street (Safe Ex. 3, p. 1; Tr. 27, 105). At other times in his life, he has lived outside of Trion at 618 South Union Street, Summerville, Georgia; Route 1, Summerville; and 499 Walnut, Summerville (Safe Ex. 3, p. 1). Although Mr. Adams proposes to continue to live within the primary service contour, he does not propose to move to Trion in the event Safe's application is granted (Safe Ex. 3, p. 3).

9. Mr. Adams has served as General Manager of station WSAF since April 1, 1985. He also served as public affairs director and announcer for WRIP/WOWE radio in Rossville, Georgia between 1973 and 1976, and worked at WGTA, Summerville, for nine months in 1982 as a part-time announcer. He holds a third class radio telephone operator's permit and amateur technician's license (*Id.*).

10. Mr. Adams has actively participated in as a member of the Publicity Committee of the Chattooga County Historical Society (July, 1986-present); American Cancer Society (April, 1985-present); American Kidney Foundation (April, 1985-present), and the local Chamber of Commerce (June, 1986 to present). He is currently serving a two-year term on the Summerville city Board of Zoning Appeals, and is a charter member of the Leadership Chattooga Program (January, 1988-present). He is also affiliated with the local Optimist Club (June, 1985-present). From 1973-1983, he served as leader of the Royal Ambassadors with his church (Safe Ex. 3,p. 2). He has also been involved with various fund raising events since April, 1985 apparently as a part of his role as General Manager of WSAF (Safe Ex. 3, p. 3).

Auxiliary Power

11. Safe proposes to acquire and utilize emergency power generators at both its transmitter site and studio location for use in the event of either localized or area-wide power failures (Safe Ex. 4).

Tri-State Broadcasting Company (Tri-State)

12. Tri-State is a Georgia business corporation. It was formed on November 10, 1949 for the purpose of owning and operating radio broadcast stations and businesses related or connected therewith. It is authorized by its corporate charter to issue up to 1,000 shares of capital stock, each share with a par value of $100 (Tri-State Ex. 1, p. 1). There are 160 shares of the capital stock of Tri-State issued and outstanding, fully-paid and nonassessable; each share bears one vote (*Id.*).

13. The officer, directors and shareholder of Tri-State are as follows: (*Id.*).

Name/Address	Office	Director ?	Shares Owned
William B. Farrar 10 Baker Street Summerville, Georgia	President/ Treasurer	Yes	160 (100%)
Carolyn K. Farrar 10 Baker Street Summerville, Georgia	Secretary	Yes	0 (0%)
Charles C. Farrar 7 Martin Street Summerville, Georgia	Vice-President	Yes	0 (0%)

14. William B. Farrar and Carolyn K. Farrar are husband and wife; Charles C. Farrar is the brother of William B. Farrar. (*Id.*).

Diversification

15. Tri-State has operated Standard Broadcast Station WGTA, Summerville, Georgia, since WGTA commenced operations on August 27, 1950. Other than Station WGTA, neither Tri-State nor any of its officer, directors, or shareholder have any intererst, direct or indirect, in any other mass media outlet (Tri-State Ex. 1, p. 2). In the event Tri-State's application for a construction permit for a new FM Broadcast Station at Trion, Georgia is granted, Tri-State and its principals, William B. Farrar, Carolyn K. Farrar and Charles C. Farrar, will divest themselves of all of their respective interests in station WGTA prior to the time the new Trion FM station commences operation under program test authority (*Id.*).

Integration

16. William B. Farrar will serve as the General Manager of the Trion FM station, devoting full-time, a minimum of 40 hours per week, to his duties. Mr. Farrar will oversee construction of the proposed station and will oversee all of its operations, including programming, sales, business, and technical operations. He will be responsible for all financial matters regarding the station, all hiring and firing, and the administration of the station's EEO program (Tri-State Ex. 2, p. 1).

17. At present, William B. Farrar is employed full-time as the general manager of radio station WGTA(AM), Summerville, Georgia. In the event Tri-State's application is granted in this proceeding, Mr. Farrar would sever his ownership interest in station WGTA(AM) and would terminate his employment as general manager of WGTA(AM) in order to devote his full attention to the Trion FM station. Mr. Farrar's only other time commitments are his personal investments, which require an average of one hour per month maximum, and his role as President of the Chattooga Chamber of Commerce Foundation, which requires a maximum of 8 to 10 hours per month. Thus, Mr. Farrar will be able to effectuate his commitment to work a minimum of 40 hours per week to the proposed station (Tri-State Ex. 2, pp. 1-2).

18. William B. Farrar first came to live in Summerville, Georigia in 1919 at the age of three. He grew up in Summerville, residing at 500 East Washington Street, graduating from high school there in 1934. He left Summerville in 1934 to study at Duke University, receiving a bachelor of science degree (Chemistry) in 1938. Following employment for 10 years as a research chemist away from Summerville, he returned to Summerville in 1948. He has resided continuously in Summerville from 1948 to the present, having owned his current residence at 10 Baker Street, Summerville, Georgia, for almost 40 years (Tri-State Ex. 2, p. 2).

19. Summerville is approximately five miles south of Trion, Georgia, and is fully within the 1 mV/m contour of the proposed FM station. All of Mr. Farrar's residences in Summerville are within the 1 mV/m contour. Both Summerville and Trion are located in Chattooga County, in northwestern Georgia; Summerville is the county seat (*Id.*).

20. In 1949, William B. Farrar and E. C. Pesterfield organized Tri-State Broadcasting Company, each man owning 50 percent of the corporation. Tri-State applied to the Federal Communications Commission for and received a construction permit for a new daytime-only AM station to serve Summerville, Georgia. This station, WGTA, was constructed during 1950 and commenced operations August 27, 1950. William B. Farrar oversaw the construction of that station, and has served as full-time, day-to-day general manager of the station from August 27, 1950 to the present day. Mr. Farrar acquired Mr. Pesterfield's interest in March, 1961, and has been the sole owner of the licensee of station WGTA since that time (Tri-State Ex. 2, pp. 2-3).

21. At the present time, Mr. Farrar is a member and a Director of the Chattooga County Chamber of Commerce, and is the Chairman of the Board of Directors of the Chattooga Chamber Foundation, a charitable organization organized by the Chamber of Commerce. He is an Elder in the Summerville Presbyterian Church, P.C.U.S.A., and is Chariman of the Board of Trustees of that church (Tri-State Ex. 2, p. 3).

22. Mr. Farrar has also been a member of the Citizens Advisory Council of the Northwest Georgia Mental Health-Mental Retardation Center, and a member of the Citizens Advisory Council of the Northwest Georgia Mental Health Hospital in Rome, Georgia. Mr. Farrar was a member of the Chattooga County Board of Education during 1953-1959. He was a member of the Chattooga County Library Board during 1974-1986. He was President of the Chattooga County Chamber of Commerce for two years, 1981 and 1982 (*Id.*).

Auxiliary Power

23. Tri-State Broadcasting Company will install auxiliary power generation facilities at its studio and transmitter sites to ensure continued operation of the proposed FM broadcast station in the event of loss of regular electric utility service (Tri-State Ex. 3).

CONCLUSIONS

Diversification

24. Safe and Tri-State have no attributable media interests. Both have timely pledged to divest their existing broadcast stations. Safe does not question the unequivocal nature of Tri-State's divestiture commitment. It urges, however, that Tri-State's proposal to divest WGTA "casts substantial doubt as to whether there would be a true diversity of voices within the service area." (Safe Findings, par. 25). Safe premises its argument on Farrar's statement that although his plan is to sell WGTA, he would turn in the license if he was unable to find a buyer. Safe's argument is without legal basis. The method of divestiture has no bearing on the validity of Tri-State's divestiture commitment. Neither Safe nor Tri-State suffer a diversification demerit.

Integration

25. Safe and Tri-State receive 100% quantitative integration credit. Safe argues that Tri-State's 100% stockholder, William B. Farrar, only works 31.5 hours per week at station WGTA, and therefore should only be credited for a proposal to work 31.5 hours per week. Safe's contention is without factual or legal basis and is rejected. Contrary to Safe's assertion, the record reflects that Farrar works 40-50 hours per week at WGTA (Tr. 93-94). The fact that a part of this time is spent calling on clients is of no consequence. *See Debra D. Carrigan*, 100 FCC 2d 721, 738 (Rev. Bd. 1985). Farrar proposes to serve as General Manager of the proposed FM station, devoting full-time, a minimum of 40 hours per week to his duties. Safe has not offered any evidence undercutting that pledge. Safe also argues that Tri-State's integration credit should be diminished because Farrar is 73 years old and has Parkinson's Disease. However, Farrar testified that the medical problem is "well under control" (Tr. 92) and Farrar's physician has not suggested that Farrar curtail his work week (Tr. 97). Safe has not proffered medical evidence raising a doubt as to Farrar's ability to fulfull his integration commitment. Therefore, Safe's contention is rejected. *See Vacationland Broadcasting Company, Inc.*, 97 FCC 2d 485 (Rev. Bd. 1984). In sum, Safe has provided no basis for reducing Tri-State integration credit and 100% quantitative integration credit will be awarded.

26. Since quantitative integration credit is even, the award of an integration preference turns on the qualitative attributes of the applicants. Tri-State's qualitative attributes are superior under the local residence, civic participation and broadcast experience criteria. Safe does not exceed Tri-State in any criterion. Tri-State's Farrar has lived within the service area for approximately 56 years, the last 41 years continuously. Safe's principal, Adams, has resided within the service area for approximately 33 years, including 9 years in Trion (although only 4 years as an adult). Farrar's longer residence in the service area warrants the award to Tri-State of a slight preference under the local residence criteria. *See Vacationland Broadcasting, supra*, 97 FCC 2d at 496; *Marlin Broadcasting of Central Florida, Inc.*, 4 FCC Rcd. 7945 (Rev. Bd. 1989). Also, Tri-State receives a moderate civic participation preference. Farrar has a record of local civic activities dating back to 1953; by contrast, with the exception of Adams' church activities, Adams' involvement in civic activities dates back only to 1985. In addition, Farrar's civic involvement has been more extensive and Farrar has held more leadership positions. Finally, Farrar receives a

broadcast experience preference. Farrar has been an owner and general manager of a radio station for more than 39 years. By contrast, Adams has been an owner and general manager for 4 1/2 years and has 8 years of commercial radio experience overall. Tri-State therefore receives a slight to moderate "overall" integration preference over Safe.

Comparative Summary

27. Neither Safe nor Tri-State receives a diversification demerit. Tri-State receives a slight to moderate "overall" integration preference over Safe. Since both applicants propose auxiliary power, that factor is of no consequence. Tri-State's application will be granted.

Accordingly, That unless an appeal from this Initial Decision is taken by a party, or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the Rules,[1] the application of Tri-State Broadcasting Company for a construction permit for a new FM station on Channel 239A in Trion, Georgia IS GRANTED; and the application of Safe Broadcasting Corporation IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph Chachkin
Administrative Law Judge

FOOTNOTE

[1] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN. Docket No. 88-469

In the Matter of

Request for Declaratory Ruling:
Section 1.1307(b); radiofrequency
radiation compliance

REPORT AND ORDER

Adopted: December 20, 1989; Released: January 18, 1990

By the Commission:

INTRODUCTION

1. In this *Report and Order* the Commission adopts new criteria for environmental evaluation of radiofrequency radiation when applicable exposure guidelines are exceeded due to emissions from multiple transmitters. In such situations, actions necessary to bring an area into compliance shall be the shared responsibility of all licensees, not otherwise categorically excluded, whose transmitters contribute more than 1% of applicable exposure limits. This *Report and Order* also provides guidelines for applicants and licensees with regard to the evaluation of intense, localized fields.

BACKGROUND

2. The National Environmental Policy Act of 1969 (NEPA) requires federal agencies to evaluate the significance of their actions on the quality of the human environment.[1] The Commission has established rules for evaluating environmental factors, which include radiofrequency (RF) radiation emissions from FCC-regulated facilities.[2] The rules dealing specifically with RF radiation are generally set forth in Section 1.1307(b).[3] Since 1986, the Commission has used the exposure guidelines of the American National Standards Institute (ANSI) to evaluate the potential environmental significance of RF radiation.[4] The Commission's rules require applicants to prepare an Environmental Assessment if a facility or operation would cause exposure of workers or the general public to levels of RF radiation in excess of the ANSI guidelines. Currently, with respect to multiple-transmitter sites, if a proposed facility or modification would result in an incremental increase in RF radiation such that the resulting cumulative exposure level would cause the ANSI guidelines to be exceeded, the applicant responsible for the increase, if not otherwise categorically excluded (see paragraph 3, *infra*), would be required to file an Environmental Assessment.[5] In the case of renewals at multiple-transmitter sites, all licensees in non-categorically excluded services are jointly responsible for resolving RF radiation problems where cumulative exposure levels exceed the ANSI guidelines, and, if a problem is not resolved, renewal applicants must file Environmental Assessments in accordance with the rules.[6]

3. Regulations adopted by the Council on Environmental Quality (CEQ) allow federal agencies to categorically exclude certain actions from environmental processing where the potential for individual or cumulative environmental impact is negligible.[7] The Commission has previously categorically excluded certain classes of stations with respect to environmental RF radiation.[8] Factors considered in categorically excluding such stations include their: 1) relatively low power levels; 2) intermittency of operation; and 3) relative inaccessibility.

4. On September 7, 1988, the Commission adopted a *Notice of Proposed Rule Making* (NPRM) to consider amending its environmental rules dealing with RF radiation. The NPRM was issued in response to a request for declaratory ruling filed by Hammett & Edison, Inc., concerning evaluation of compliance with RF exposure standards at sites involving multiple transmitters.[9] Hammett & Edison requested clarification of Commission guidelines concerning whether an applicant's facility would belong to a particular "site" and whether that facility "significantly" affected the environment. The petitioner proposed that 5% of the exposure guidelines be established as a threshold for requiring routine evaluation for RF radiation. Hammett & Edison also requested guidance regarding the evaluation of intense, localized, electromagnetic fields ("hot spots") near re-radiating objects.

5. In the NPRM, the Commission generally agreed with Hammett & Edison regarding the desirability of establishing a threshold for exclusion at multiple transmitter-sites.[10] However, the Commission stated that it believed a 1% threshold would be more appropriate than the 5% threshold proposed by the petitioner. The NPRM proposed to establish a new category for exclusion from routine evaluation of environmental RF radiation at sites where multiple transmitters are located. At such sites any transmitter that could be shown to create exposure levels in accessible areas that were 1% or less of the ANSI exposure guidelines would be excluded from consideration.[11]

6. The NPRM also proposed that when the exposure guidelines are exceeded at a multiple-transmitter site, the responsibility for corrective action would be limited to non-categorically excluded stations contributing more than 1% of the ANSI exposure limits at the area(s) where the guidelines are exceeded. The 1% threshold was to be based on the specific exposure limit that applies to each respective transmitter at a site (the guidelines specify different limits for different frequencies). Thus, under the proposal, an applicant for a new or modified facility (in a noncategorically excluded service), at a multiple-transmitter site where cumulative exposure levels exceed the ANSI guidelines, would not have to file an Environmental Assessment if its station would not produce exposure levels in excess of 1% of the ANSI guidelines. Similarly, a renewal applicant (in a non-categorically excluded service) would only be responsible for filing an Environmental Assessment at a multiple-transmitter site if its facility produced exposure levels in excess of 1% of the ANSI guidelines in an area where the guidelines are exceeded.[12]

7. The NPRM also addressed the measurement and interpretation of localized, intense, electromagnetic fields. These so-called "hot spots" have been a matter of controversy for some time. The phenomenon occurs due to

distortions in local RF electromagnetic fields due to nearby conductive objects. The issue is how to measure such fields and how relevant those measurements are to compliance with RF exposure guidelines. Although the Commission did not propose a specific rule regarding this issue, it did propose guidance on appropriate measurement procedures based on information from the U.S. Environmental Protection Agency and others.

8. In this regard, we pointed to information from EPA and others suggesting that a separation distance of 10 to 20 centimeters (cm) appeared to be appropriate. Hammett & Edison had requested that the Commission specify that field measurements should be made with the sensing probe no closer than 20 cm to any re-radiating metallic object. If 20 cm was not considered appropriate by the FCC, Hammett & Edison asked that an alternative distance be specified. The petitioner's original suggestion was based on experience showing that the majority of "hot spots" occur within 8 inches (20 cm) of re-radiating metallic objects and are so localized as "to preclude significant whole-body exposures." Further comment was invited concerning this subject.

9. In response to the NPRM, eight parties filed comments and three parties filed reply comments.[13]

DISCUSSION

Environmental Evaluation at Multiple - transmitter Sites

Comments

10. In general, the commenting parties support the concept of excluding minor contributors from responsibility for evaluating RF radiation and for corrective action at multiple-transmitter sites. However, there is some disagreement over the specifics of how the exclusion should be defined.

11. GTE, CBS, and the EPA all express general support for the proposed 1% threshold for exclusion. However, CBS urges the Commission to specify the means by which applicants determine whether a facility would meet the 1% criterion. CBS believes the Commission should use 1% of the levels recommended in the current guidelines and not tie the 1% trigger into future, and possibly more restrictive guidelines. According to CBS, if the Commission based the 1% exclusion trigger on "applicable" guidelines, future adoption of more restrictive limits could "automatically reduce the benchmark to a point that would be so negligible as to eliminate any realistic possibility of exclusion, to the prejudice of all those who constructed facilities in reliance on the exclusion." CBS suggests that if subsequent studies show that the 1% (of current ANSI limits) value is too low or too high, it could be changed by the Commission.

12. CBS also suggests that the rules provide for cancellation of the automatic 1% exclusion when a new transmitter would increase power density levels "in a significant manner." CBS is concerned about situations in which a site would be in compliance, but a newcomer, otherwise categorically excluded, would cause the guidelines to be exceeded or more expensive compliance methods to become necessary. In such a case, CBS urges that the applicant for the new facility or change be made responsible for the cost of bringing the site into compliance.

13. The EPA restates its opposition to the original proposal of Hammett & Edison for use of a 5% exclusion trigger. According to the EPA, 50 microwatts/cm^2 (the equivalent of 5% of the ANSI limits for VHF frequencies) "is not a trivial exposure." Furthermore, EPA points out that a level of 50 microwatts/cm^2 is 5% of the current FCC-specified guidelines at VHF frequencies but is 50% of the most stringent exposure limit considered in EPA's July 1986 proposal for controlling public exposure to radiofrequency radiation. The EPA notes that this level is also 25% of the VHF limit recommended in 1986 by the National Council on Radiation Protection and Measurements (NCRP).[14] "When viewed in light of the EPA and NCRP proposals," EPA continues, "the alternative criterion proposed by Hammett & Edison is not trivial." EPA notes that the policy for categorical exclusion established under NEPA is designed to identify activities and impacts that are "clearly not significant and do not require detailed analysis." Since in EPA's judgement the Hammett & Edison proposal for a 5% threshold is "not trivial," EPA "does not believe that it should be utilized to establish a categorical exclusion."

14. Other respondents to the NPRM urge the Commission to adopt a 5% threshold rather than the 1% value proposed in the NPRM. Hammett & Edison supports the Commission's proposals for exclusion from responsibility at multiple-user sites, but reiterates its position that a 5% exclusion level would better accomplish the Commission's stated goal of "focusing attention on the major emitters at a site rather than on low-powered newcomers whose overall effect would be negligible." Hammett & Edison comments further that, when many sources at a site each contribute under 5% of the guidelines, it is unlikely that they would, in the aggregate, cause the limits to be exceeded. Hammett & Edison continues, that if such situations did occur, they would be better addressed by a process of "complaint-triggered" review and handled on a case-by-case basis.

15. Hammett & Edison and NAB take issue with the EPA's characterization of 50 microwatts/cm^2 as "not trivial." According to Hammett & Edison, EPA's comparison with other, more restrictive, guidelines that have not been adopted is inappropriate. Although Hammett & Edison agrees that an exclusion level based on 50% or 25% of an exposure standard could not be characterized as "non-significant," it points out that the applicable exposure guideline continues to be the 1982 ANSI C95.1 protection guide that allows unlimited exposures at 1000 microwatts/cm^2 at VHF frequencies. Hammett & Edison suggests that if more restrictive limits are adopted in the future by the FCC, the 5% exclusion could be reviewed at that time as to its appropriateness.

16. The NAB points to "uncertainties" inherent in the scientific literature and the ten-fold safety factor already incorporated into the ANSI standard as evidence for supporting the less restrictive 5% threshold. Hammett & Edison and the NAB note that EPA recently has proposed "disbanding" its non-ionizing radiation program "largely on the ground that there is no clearly demonstrable public harm," according to NAB. Therefore, they argue that EPA's action seems to contradict its own assertions in this proceeding.

17. Jules Cohen argues that the conservative nature of calculations used for determining the field-strength contribution a transmitter would make justifies using a 5% threshold. He states that experience shows "almost with-

out exception" that measured field strengths are less than predicted values. Cohen also cites the high degree of variability of signal levels at a given location in a multiple-user site. This, he says, means that there is a low probability that the location of maximum field strength caused by a new source would coincide with the location of the maximum created by all transmitters at a site. Cohen also points out the time-averaging aspects of the ANSI guidelines to support his position. He maintains that locations where all contributions combined to produce peak field intensities would be highly localized, and that there would be little probability that a person would "linger" at such a "narrowly defined spot" so that exposure would exceed the guidelines.

18. The NAB maintains that reducing the triggering threshold from 5% to 1% would essentially double the distance where potential contributors must be considered." This, NAB continues, would "needlessly" impact a greater number of stations. According to NAB, past studies by the EPA showed that exposure guidelines set at 1% of the current ANSI standard would affect 3350 existing FM radio stations, whereas if the guidelines were 5% only 1500 stations would be affected.

19. The Commission's proposed rule amendment specified that the exclusions would apply to transmitters that do not create "electromagnetic fields in any accessible area that exceed 1% of the exposure limits." Hammett & Edison suggests modifying the proposed language by adding the word "publicly" in front of "accessible area." Its justification for this change is that "virtually any area is accessible by some means." However, GTE and EEPA disagree with Hammett & Edison on this point. Both GTE and EEPA note that the ANSI standard currently used by the Commission does not differentiate between public and occupational exposure. EEPA reasons that adding the word "publicly" would only confuse the issue, since it would imply that the rule applied only to exposure of the general public and not to workers.

CONCLUSIONS

20. The Commission believes the public interest in this matter is best served by amending Section 1.1307(b) of the FCC's Rules as proposed in the NPRM, with some minor word changes. The amended rules specify that, at locations with multiple transmitters, compliance is the shared responsibility of all non-categorically excluded licensees that operate transmitters producing more than 1% of applicable ANSI exposure limits. Other facilities are categorically excluded from responsibility for evaluation of RF radiation exposure at such sites or from taking any corrective action, and thus Environmental Assessments for these excluded facilities need not be filed.

21. To implement this policy, the explanatory note that previously followed paragraph (b) of Section 1.1307 of the Rules is being modified. There will now be three notes following this paragraph (see Appendix). Note 1 specifies the rule parts covered by paragraph (b) and categorically excludes other services. Note 2 addresses the situation at multiple-transmitter sites, specifying that responsibility for compliance at such sites will be limited to those facilities (not otherwise categorically excluded) that individually exceed the 1% threshold. Finally, Note 3 points out that, under the provisions of paragraphs (c) and (d) of Section 1.1307, the Commission reserves the right to review the environmental significance of any action that might be otherwise categorically excluded. While we are adding an additional categorical exclusion today regarding multiple-transmitter sites, Environmental Assessments would only be required in situations where the ANSI guidelines are exceeded due to cumulative radiation at a multiple-transmitter site.

22. We would expect that the allocation of responsibility for corrective action at multiple-transmitter sites would be generally in proportion to the respective contributions of the various transmitters involved. However, as discussed below, in the case of a newcomer, not categorically excluded under Note 1, whose additional contribution of more than 1% of the guidelines would cause a location previously in compliance to become non-complying, the responsibility for corrective action would rest with the newcomer.

23. Originally, four notes had been proposed in the Commission's NPRM. However, the original "Note 2" has been deleted from the amended rule. That note had indicated that the threshold for categorical exclusion would be 1% of the exposure limits. However, such a note would be redundant since the original Note 3 (now Note 2) would automatically provide for categorical exclusion at the 1% level at multiple-transmitter sites. Other transmitters, not located at multiple-transmitter sites, that comply with the exposure guidelines are already excluded by Section 1.1306 of the Rules (see footnote 10). Therefore, the version of Note 2 contained in the NPRM is unnecessary.

24. Although we appreciate the basis for the objections raised in the comments to the 1% threshold, we remain convinced that the justification is stronger for using a 1% threshold rather one set at 5%. Under the National Environmental Policy Act (NEPA), federal agencies are allowed to define categories for exclusion only if actions in those categories "do not individually or cumulatively have a significant effect on the human environment . . . ."[15] Consistent with NEPA, our goal in adopting an exclusion threshold is to assure that there is little likelihood for significant environmental effect from the transmitters excluded, either individually or cumulatively. While we are sensitive to concerns over increased burden, in our opinion it is better to err on the side of caution in selecting categories for automatic exemption, and, in this case, the difference between 1% and 5% appears to be significant. In that regard, we place significant reliance on the judgement of the EPA. In spite of recent EPA policy decisions, that agency still retains the primary expertise in the Federal Government regarding environmental exposure to radiofrequency radiation. The EPA's position is that the 5% level is not acceptable as a threshold for automatic exclusion from consideration.

25. The Commission disagrees with NAB's argument that using 1% will significantly increase the burden on applicants and current licensees. Most applicants and licensees will not be involved in non-complying, multiple-use situations. For non-categorically excluded applicants and licensees the necessity to determine whether they will come within a given threshold, e.g., 1%, 5%, or 100%, remains unchanged from present policy and requires essentially the same type of analysis. Except for situations involving non-complying, multiple-use sites, applicants and licensees whose transmitters, create fields of less than 100% of the limits in accessible areas only have to certify compliance with the guidelines and would then be "cate-

gorically excluded" under Section 1.1306. Furthermore, at multiple-user sites most of the burden for compliance would fall upon the major emitters.

26. In its comments, CBS expresses concern that a transmitter, otherwise categorically excluded, might cause the guidelines to be exceeded at a multiple-user site that is already in compliance. This may be a legitimate concern. Note 2 of the amendment only applies to transmitters in services that are not already categorically excluded by Note 1. It is possible that RF radiation emissions from transmitters in categorically excluded services, such as some land-mobile base stations, might constitute a significant percentage of cumulative levels at multiple-use sites. The Commission plans to investigate this issue to determine whether the scope of Note 2 should be broadened to apply to all or additional services at multiple-transmitter sites. In any event, we emphasize that, as indicated in Note 3 of the amendment, paragraphs (c) and (d) of Section 1.1307 of the Rules allow ad hoc environmental evaluation, if appropriate, even for transmitters in categorically excluded services.

27. CBS also refers to the situation involving a newcomer at a site that is already in compliance or just barely in compliance with exposure guidelines. In cases where an existing site is already in compliance and a proposed facility or modification, not already categorically excluded, causes an increase in RF levels to the point where the guidelines are clearly exceeded, the newcomer would be required to prepare an Environmental Assessment in accordance with Sections 1.1308 and 1.1311 of the Rules if the newcomer's facility would cause increased exposure levels in excess of 1% of the guidelines. Commission staff would review the Environmental Assessment before approving the proposal, and any corrective action necessary to assure compliance would normally be the responsibility of the applicant for the proposed facility or modification.

28. A similar situation involves a multiple-transmitter location where indicated exposure levels are already on the order of 99-100% of the guidelines and a newcomer would add an additional 1% to the area, thus "creating" a non-complying situation. However, such situations would not be expected to arise often, and, when they did, could be handled on a case-by-case basis. In any event, all parties involved in such a situation would have to take a close look at electromagnetic fields existing in the area, since measurement and prediction techniques are not absolutely precise.

29. Finally, we see no justification for acceding to Hammett & Edison's request to specify that the rules apply only to "publicly" accessible areas. As pointed out by others, the ANSI guidelines apply to both public and occupational exposure, and there is no intent on the part of the Commission to limit environmental evaluation only to exposure of the general public.

Intense Localized Electromagnetic Fields (" Hot Spots ")

Comments

30. Commenting parties support the establishment of a standard for the minimum distance between a measurement probe and re-radiating objects. Hammett & Edison and GTE urge adoption of an "unambiguous" minimum distance of 20 cm. CBS and the NAB also support a separation distance of at least 20 cm. According to Hammett & Edison, "hot spots" in the 10-20 cm range would, "have little likelihood of causing SAR's [specific absorption rates] in excess of the ANSI limit," and such a requirement would "continue to place an unnecessary burden on parties performing field surveys and upon stations having to comply." GTE comments that "it would be highly desirable to have a definitive method for the measurements in order to avoid disputes over the data and, thus, ensure compliance with the FCC's Rules."

31. Cohen, Dippell, & Everist (C,D,&E) suggest that an acceptable distance would be that "at which the measurement probe is not modified by the external reradiating conductive object and which will not result in an abnormal reading." C,D,&E agreed that a separation distance of 10-20 cm seems appropriate. The firm noted that in certain instances "hot spots" measured by broadband instruments could not be replicated using narrowband instruments. According to C,D,&E, "experience has shown that many of the 'hot spots' exist for a small fraction of a meter and therefore may not represent a significant whole-body exposure in free-space."

32. Jules Cohen maintains that no consideration should be given to fields within 20 cm of conducting objects. He suggests that two categories of "hot spots" should be recognized: (1) areas of significant size where a higher signal strength prevails than in the general survey area, and (2) highly localized areas where moving the probe only a few centimeters results in significantly lower readings. Cohen indicates that only category (2) is relevant to the present discussion.

33. According to Cohen, hot spots in category (2) are caused by coupling between the probe of the measuring device and the conductive object which modifies the probe impedance and affects energy transfer from the probe to the device. Reasons for maintaining an adequate separation distance include: (1) to avoid inaccurate readings, and (2) because exposure guidelines are based on whole-body exposure, and "the entire body, or even a substantial portion of the body cannot be inserted into the area within 20 centimeters (8 inches) of the reradiator." Cohen notes that the re-radiating objects commonly encountered in these situations are short metallic posts or hand rails.

34. Cohen points out that energy cannot be created by a conductor immersed in an RF field. The conductor can only re-radiate a portion of the energy it intercepts. Therefore, Cohen continues, if the power density in the general area near the conductive object is less than guideline levels, the actual power density in the immediate vicinity of the re-radiator would have to be less than the guidelines. Since measurements made near a re-radiator would be in its "near field," according to Cohen, at any given point the E-field may be high but the H-field low, and vice versa. In other words, no orthogonal relationship exists between the field vectors, and the specific absorption rate (SAR) would be "substantially less than measurement of either the electric or magnetic field might suggest."

35. A related question pertains to whether the specified minimum separation distance is to be measured from the center of the sensing probe or from the closest sensing element of the probe. Hammett & Edison also requests clarification on this point and urges the Commission to specify the latter measurement procedure.

CONCLUSIONS

36. The issue of measurement and interpretation of intense localized fields ("hot spots") remains a controversial subject. At this time, we do not believe that this issue should be addressed in the form of an FCC rule. Rather, as noted previously, we will provide guidelines to licensees and applicants that represent the Commission's best judgement concerning this topic. We also continue to refer our licensees to our OST Bulletin No. 65 (footnote 4) for guidance. The following discussion should be considered to be supplementary to the discussion found in Bulletin 65.

37. In its 1982 protection guidelines, ANSI specified that measurements "shall be made at distances 5 cm or greater from any object."[16] However, it has become apparent that this specification should be qualified to address the problem of distortions in localized RF fields due to re-radiating objects. The EPA and others have suggested that an appropriate separation distance between the sensing probe of an instrument and any re-radiating object should be 10-20 cm. In our NPRM in this docket we stated that pending further guidance from qualified organizations or agencies we would advise our licensees that "appropriate use" of the 10-20 cm criterion is acceptable.

38. From the comments submitted in this proceeding there appears to be significant evidence that measurements made within 20 cm of re-radiating objects can exaggerate and inaccurately reflect the potential for whole-body exposure at such a location. Therefore, we conclude that in such situations it is generally appropriate to maintain a 20 cm separation distance for measurements pertaining to whole-body exposure.

39. However, we also note that the ANSI standard contains an exclusion clause relevant to partial-body exposure.[17] That clause provides that the protection guides may be exceeded if exposure conditions can be shown to produce peak specific absorption rates below 8 watts/kilogram as averaged over any one gram of tissue. This would imply that peak exposures of 8 W/kg or greater are to be avoided, and it is not clear that the "hot spots" being addressed in this proceeding may not be relevant to the potential for partial body exposure.

40. The major point raised in comments filed regarding the "hot spot" issue is whether a 10 cm or 20 cm separation distance is appropriate. We suggest that even though we are recommending a 20 cm minimum distance for routine measurements, consideration should also be given to any area where there is an indication of excessive fields for separation distances in the range of 10-20 cm. For example, such areas could be posted with a sign noting the presence of a localized field and advising that this area should be avoided for periods that exceed the ANSI six-minute averaging period. The posting of such information will not be specifically required for showing compliance with the ANSI protection guides. However, it is recommended as a precaution because of the lack of information on the relevance of "hot spots" to partial-body exposure.

41. Hammett & Edison raised the issue of how the minimum separation distance between sensing probe and re-radiating object should be measured. We believe that it is reasonable that the separation distance be measured from the closest sensing element of the probe, rather than from the center of the probe. Measuring from the center would significantly reduce the separation necessary to prevent the energy coupling, mentioned by Jules Cohen, that can occur between a probe and a re-radiating object.

42. In summary, it is recommended that during routine measurements of radiofrequency fields for compliance purposes, a minimum separation distance of 20 cm be maintained between a re-radiating object and the closest sensing element of a probe. However, as a precautionary measure it is also recommended that consideration be given to the presence of intense, localized fields in the range of 10-20 cm from a re-radiating object.

FINAL REGULATORY FLEXIBILITY ACT ANALYSIS[18]

I. Need and purpose of this action:

In accordance with the National Environmental Policy Act of 1969 (NEPA), this action is being taken to minimize the potential for significant environmental impact from radiofrequency (RF) radiation from FCC-regulated transmitters while, at the same time, minimizing unnecessary burden on applicants and licensees. This Report and Order amends the Commission's rules with regard to categorical exclusion from consideration of environmental RF radiation and with regard to responsibility for compliance with exposure guidelines at multiple-transmitter sites. This item also provides applicants and licensees with guidelines for appropriate RF measurement procedures.

II. Issues raised by the public in response to the Initial Regulatory Flexibility Act Analysis:

No comments were received addressing the Initial Regulatory Flexibility Analysis.

III. Significant alternatives considered and rejected:

The questions raised in this proceeding address Commission policy with respect to categorical exclusion of certain transmitters from consideration under Section 1.1307(b) of the Rules. Significant alternatives considered and rejected were: (1) the use of a 5% threshold for exclusion rather than a 1% threshold; (2) the addition of the phrase "publicly accessible areas" to the rule amendment requiring environmental analysis at multiple-transmitter sites. These alternatives were rejected for the reasons discussed in the text of this Report and Order.

ORDERING CLAUSES

Accordingly, IT IS ORDERED that, effective **April 18, 1990,** Part 1 of the Commission's Rules and Regulations, Chapter I of Title 47 of the Code of Federal Regulations, IS AMENDED as set forth in the Appendix and that this amendment will be applicable to applications filed on or after this effective date.

This action is taken pursuant to the provisions of Sections 4(i), 4(j), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 154(j) and 303(r), and Section 553 of the Administrative Procedure Act, 5 U.S.C. Section 553.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Part 1, Chapter I, of Title 47 of the Code of Federal Regulations is amended as follows:

Part 1 - Practice and Procedure

1. The authority citation for Part 1 continues to read:

Authority: Secs. 4 i), 4 (j), and 303 (r) of the Communications Act of 1934, as amended, 47 U.S.C. 154 (i), 154 (j), and 303 (r).

2. In Section 1.1307, the note following paragraph (b) is revised to read as follows:

§ 1. 1307 Actions which may have a significant environmental effect, for which Environmental Assessments (EAs) must be prepared.

* * * * *

(b) * * *

NOTE 1: Paragraph (b) shall apply to facilities and operations licensed or authorized under the following Parts of the Commission's Rules: 5, 25, 73, 74 (Subpart A), 74 (Subpart G), 74 (Subpart L; applicable only to FM booster stations with output powers in excess of 10 watts), and 80 (applicable only to ship earth stations). Facilities and operations licensed or authorized under all other Parts, Subparts, or Sections of the Commission's Rules shall be categorically excluded from consideration under paragraph (b).

NOTE 2: When the exposure guidelines specified in paragraph (b) are exceeded in an accessible area due to emissions from multiple transmitters, actions necessary to bring the area into compliance with the guidelines shall be the shared responsibility of all licensees (not otherwise categorically excluded under Note 1) whose transmitters produce fields at the area in question in excess of 1% of the exposure limits applicable to their transmitter. Applicants for proposed facilities or modifications (not otherwise categorically excluded under Note 1) that would cause non-compliance at an area previously in compliance must submit an Environmental Assessment in accordance with Sections 1.1308 and 1.1311 if emissions from the applicant's facility would exceed 1% of the exposure limit applicable to that facility. Renewal applicants whose facilities contribute radiation to an area not in compliance under paragraph (b) must submit an Environmental Assessment if their transmitter's contribution to the area of non-compliance exceeds 1% of the exposure limit applicable to that transmitter.

NOTE 3: Any of the exclusions from consideration under paragraph (b) noted above may be superseded by actions taken by the Commission under the provisions of paragraphs (c) or (d) of this Section.

* * * * *

FOOTNOTES

[1] National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §4321 *et seq* ., (1976).

[2] 47 CFR §1.1301 *et seq*.

[3] 47 CFR §1.1307(b).

[4] *See Report and Order*, Gen. Docket 79-144, 50 Fed. Reg. 11151 (1985), 100 FCC 2d 543 (1985). Also, *see* "American National Standard Safety Levels with Respect to Human Exposure to Radio Frequency Electromagnetic Fields, 300 kHz to 100 GHz," (ANSI C95.1-1982) of the American National Standards Institute (ANSI). Copyright 1982 by the Institute of Electrical and Electronics Engineers, Inc. Further information on this standard and compliance with it is discussed in the Commission's OST Technical Bulletin No. 65, "Evaluating Compliance with FCC-Specified Guidelines for Human Exposure to Radiofrequency Radiation."

[5] *See Report and Order*, 50 Fed. Reg. 11151 (1985), 100 FCC 2d at 556 (1985). Also, *see* OST Bulletin No. 65, pages 24-26.

[6] Ibid.

[7] Council on Environmental Quality (CEQ), Implementation of Procedural Provisions, Final Regulations, 43 Fed. Reg. 55,978 (1978), 40 CFR §1500-1508. The term "categorical exclusion" is defined by CEQ in Section 1508.4. CEQ has oversight responsibilities with respect to implementation of NEPA by agencies of the Federal Government.

[8] Gen. Docket 79-144, *Second Report and Order*, 52 Fed. Reg. 13,240 (1987), 2 FCC Rcd 2064 (1987) and 2 FCC Rcd 2526 (1987); *Third Report and Order*, 53 Fed. Reg. 28223 (1988), 3 FCC Rcd 4236 (1988), 53 Fed. Reg. 41169 (1988), 3 FCC Rcd 5928 (1988). *See also*, Gen. Docket 87-551, Report and Order, 54 Fed. Reg. 1177 (1989), 3 FCC Rcd 7332 (1988), 4 FCC Rcd 1761 (1989).

[9] *Notice of Proposed Rule Making*, Gen. Docket 88-469, 53 Fed. Reg. 40918 (1988), 3 FCC Rcd 5922 (1988). *See also*, Public Notice, "Petition for Rule Making (Radiofrequency Radiation Compliance)," RM-6081, September 10, 1987.

[10] In areas that do not involve multiple transmitters, the Rules already provide for categorical exclusion if a facility is in compliance with the RF guidelines. *See* 47 C.F.R. §1.1306(b)(3).

[11] The term "accessible area" in this context refers to locations where there are no natural or artificial restrictions on access by either the general public or employees of the facility.

[12] The actual filing of an Environmental Assessment, in accordance with Section 1.1311 of the Rules, can be avoided by prior coordination and cooperation of the parties occupying a multiple-transmitter site to reduce RF radiation to levels in compliance with the ANSI guidelines. We anticipate and encourage such actions.

[13] The following parties filed comments and/or replies: CBS, Inc.; Jules Cohen, P.E.; Cohen, Dippell, and Everist, P.C.; Communications General Corporation; Doug C. McDonell, Technical Consultant; GTE Service Corporation; National Association of Broadcasters (NAB); Hammett & Edison, Inc. (comments and reply comments); Electromagnetic Energy Policy Alliance (EEPA) (reply comments); and the U.S. Environmental Protection Agency (EPA) (reply comments).

[14] The National Council on Radiation Protection and Measurements (NCRP) is a non-profit corporation chartered by the U.S. Congress to, among other things, make recommendations concerning protection against potentially harmful radiation.

[15] *See* 40 CFR §1508.4.

[16] ANSI C95.1-1982 at Section 4.3.

[17] ANSI C95.1-1982 at Section 4.2.

[18] This analysis is made pursuant to the provisions of the Regulatory Flexibility Act of 1980, 5 U.S.C. §604.

Before the
Federal Communications Commission
Washington, D.C. 20554

BC Docket No. 78-165

In the Matter of:

Amendment of the Commission's
Multiple Ownership Rules to Include
Educational FM and TV Stations

ORDER

Adopted: December 28, 1989; Released: January 11, 1990

By the Commission:

1. On June 7, 1978, the Commission adopted a *Notice of Proposed Rule Making* in the above entitled matter, 68 FCC 2d 831 (1978), proposing to apply, in part, the Commission's multiple ownership rules to noncommercial FM and/or television stations. Specifically, the *Notice* questioned whether noncommercial stations should be considered under our rules (1) limiting the number of AM, FM, and television stations that an individual or entity may own on a national basis and (2) prohibiting the common ownership of two broadcast stations in the same service whose relevant contours overlap.

2. Upon a review of the status of this proceeding, we have determined that it should be terminated without prejudice. In view of the significant amount of time that has elapsed since the initiation of this proceeding and in light of changes within the broadcasting industry and in the Commission's regulations themselves during this period, we believe that it would not serve the public interest to attempt to resolve this proceeding based on the existing record.

3. Accordingly, IT IS ORDERED that BC Docket No. 78-165 IS TERMINATED without prejudice.

4. This action is taken pursuant to authority contained in Sections 4(i) and 303 of the Communications Act of 1934, as amended.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

BC Docket No. 81-705

In the Matter of:

Amendment of the Commission's rules,
§ 73.1202, to Eliminate the
Requirement that Licensees Retain
Letters Received From the Public

ORDER

Adopted: December 27, 1989; Released: January 11, 1990

By the Commission:

1. On October 1, 1981, the Commission adopted a *Notice of Proposed Rule Making* in the above entitled matter, 46 Fed. Reg. 54787 (Nov. 4, 1981), to amend the Commission's rules requiring television and radio licensees to maintain within their public inspection files letters received from the public.

2. Upon a review of the status of this proceeding, we have determined that it should be terminated without prejudice. In view of the significant amount of time that has elapsed since the initiation of this proceeding and in light of changes within the broadcasting industry and in the Commission's regulations themselves during this period, we believe that it would not serve the public interest to attempt to resolve this proceeding based on the existing record.

3. Accordingly, IT IS ORDERED that BC Docket No. 81-705 IS TERMINATED without prejudice.

4. This action is taken pursuant to authority contained in Sections 4(i) and 303 of the Communications Act of 1934, as amended.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

BC Docket No. 78-164

In the Matter of

Amendment of the Commission's rules governing the eligibility for noncommercial educational FM and TV broadcast station licenses.

ORDER

Adopted: December 27, 1989; Released: January 11, 1990

By the Commission:

1. On June 7, 1978, the Commission adopted a *Notice of Inquiry* in the above entitled matter, 43 Fed. Reg. 30842 (July 18, 1978), to amend its rules governing who is eligible to become a licensee of an educational FM or TV broadcast station. This proceeding focused mainly on appropriately defining non-profit educational organizations.

2. Upon a review of the status of this proceeding, we have determined that it should be terminated without prejudice. In view of the significant amount of time that has elapsed since the initiation of this proceeding and in light of changes within the broadcasting industry and in the Commission's regulations themselves during this period, we believe that it would not serve the public interest to attempt to resolve this proceeding based on the existing record.[1]

3. Accordingly, IT IS ORDERED that BC Docket No. 78-164 IS TERMINATED without prejudice.

4. This action is taken pursuant to authority contained in Sections 4(i) and 303 of the Communications Act of 1934, as amended.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTE

[1] We note that although we are terminating this proceeding we are not without guidelines to determine the eligibility of noncommercial educational station licensees. The *Notice of Inquiry* set forth the standards then used by the staff to process applications for noncommercial educational FM and television station licenses. We have applied those standards on an *ad hoc* basis during the pendency of this proceeding and will continue to utilize them to determine the eligibility of applicants for noncommercial educational facilities.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 85-192

In the Matter of

Reexamination of the "Single Majority Stockholder" and "Minority Incentive" Provisions of Section 73.3555 of the Commission's Rules and Regulations

ORDER

Adopted: December 27, 1989; Released: January 11, 1990

By the Commission:

1. On June 7, 1985, the Commission adopted a *Notice of Proposed Rule Making* in the above entitled matter[1] seeking comment on the interaction between the "single majority stockholder" exception to its ownership attribution standards[2] and the "minority incentive" provisions added to its national multiple ownership (or 12-12-12) rules. [3] The Commission instructed the staff to prepare the present *Notice* at the time it adopted the "minority incentive" provisions to deterimine whether, and to what extent, the two provisions may operate at cross-purposes and what changes to the provisions might be warranted to remedy any conflict.[4]

2. The American Legal Foundation (ALF) filed a Petition for Reconsideration requesting that the Commission either delete the minority incentive provisions or reopen a rule making proceeding on the provisions. ALF also appealed the Commission's order adopting the minority incentive provisions in the U.S. Court of Appeals for the D.C. Circuit.[5] That appeal is being held in abeyance pending Commission action on the ALF Petition. The Commission has not yet acted on the Petition because it raises issues regarding the constitutionality of the minority incentive provisions which are very similar to issues currently under litigation in *Winter Park Communications, Inc. v. FCC*, 863 F.2d 347, *reh'g denied*, Nos. 85-1755 and 85-1756 (D.C. Cir. June 21, 1989), *petition for cert. filed sub nom. Metro Broadcasting, Inc. v. FCC*,No. 89-453 (Sept. 18, 1989). The Commission believes that until it is able to finalize its order adopting the minority incentive provisions, it is premature to examine the interaction between the provisions and the single majority stockholder exception in this proceeding.

3. Moreover, in view of the significant amount of time that has elapsed since the initiation of this proceeding, we believe that it would not serve the public interest to attempt to resolve this proceeding based on the existing record. Therefore, we have determined that it should be dismissed without prejudice.

4. Accordingly, IT IS ORDERED that MM Docket No. 85-192 IS TERMINATED without prejudice.

5. This action is taken pursuant to authority contained in Sections 4(i) and 303 of the Communications Act of 1934, as amended.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] *Notice of Proposed Rule Making* in MM Docket No. 85-192, FCC 85-303, 50 Fed. Reg. 27,629 (July 5, 1985).

[2] *See* 47 C.F.R. § 73.3555, NOTE 2(b); § 76.501, NOTE 2(b) (1984); and *Report and Order* in MM Docket No. 83-46, 97 FCC 2d 997, 1008-09 (1984), *recon. granted in part*, 58 RR 2d 604 (1985), *further recon. granted in part*, 1 FCC Rcd 802 (1986).

[3] *See* 47 C.F.R. § 73.3555(d); and *Memorandum Opinion and Order* in Gen. Docket No. 83-1009, 100 FCC 2d 74 (1985), *appeal pending sub nom. National Association of Black Owned Broadcasters v. FCC*, No. 85-1139 (D.C. Cir. filed March 4, 1985).

[4] *See Memorandum Opinion and Order*, 100 FCC 2d at 95 n. 60.

[5] *See National Association of Black Owned Broadcasters v. FCC*, No. 85-1139 (D.C. Cir. filed March 4, 1985).

Before the
Federal Communications Commission
Washington, D.C. 20554

BC Docket No. 80-757

In the Matter of

Amendment of the Rules Concerning
Automation of the Use of Measurement
Data for AM Broadcast Stations

Order

Adopted: December 27, 1989; Released: January 11, 1990

By the Commission:

1. On December 4, 1980, the Commission adopted a *Notice of Inquiry* in the above entitled matter, 45 Fed. Reg. 82973 (Dec. 17, 1980), to amend the rules pertaining to the preparation and processing of the engineering portion of applications for AM broadcast stations from manual processing to automated processing.

2. Upon a review of the status of this proceeding, we have determined that it should be terminated without prejudice. In view of the time that has elapsed since the initiation of this proceeding, in light of changes in the Commission's regulatory processes during this period, and in view of the current scarcity of administrative resources to implement the proposed process if it were adopted, we believe that it would not serve the public interest to attempt to resolve this proceeding based on the existing record.

3. Accordingly, IT IS ORDERED that BC Docket No. 80-757 IS TERMINATED without prejudice.

4. This action is taken pursuant to authority contained in Sections 4(i) and 303 of the Communcations Act of 1934, as amended.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 85-299

In the Matter of

Distress Sale Policy of Broadcast
Licensees

ORDER

Adopted: December 27, 1989; Released: January 11, 1990

By the Commission:

1. On October 8, 1985, the Commission adopted a *Notice of Inquiry* in the above entitled matter, 50 Fed. Reg. 42047 (1985), to explore the desirability of expanding the availability of the distress sale option which was intended to promote minority ownership in broadcasting. The proposed change would have permitted distress sales after the commencement of a revocation hearing.

2. On March 31, 1989, the U.S. Court of Appeals for the D.C. Circuit held that the Commission's distress sale policy was unconstitutional in *Shurberg Broadcasting of Hartford, Inc. v. FCC*, 876 F.2d 902, *reh'g denied*, 876 F.2d 953 (D.C. Cir. 1989), *petition for cert. filed sub nom. Astroline Communications Co. v. Shurberg Broadcasting of Hartford, Inc.*, No. 89-700 (Oct. 30, 1989). If the Supreme Court denies certiorari, the D.C. Circuit's determination that the distress sale policy is unconstitutional will be final, and the present *Notice* seeking to expand the distress sale policy will be moot. In any event, in view of the time that has elapsed since the initiation of this proceeding and intervening events relating to the constitutionality of the underlying policy, we believe that it would not serve the public interest to attempt to resove it based on the existing record. We have determined, therefore, that the proceeding should be terminated without prejudice.

3. Accordingly, IT IS ORDERED that MM Docket No. 85-299 IS TERMINATED without prejudice.

4. This action is taken pursuant to authority contained in Sections 4(i) and 303 of the Communications Act of 1934, as amended.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

BC Docket No. 80-499

In the Matter of

Table of Television
Channel Allotments

ORDER

Adopted: December 27, 1989; Released: January 11, 1990

By the Commission:

1. On September 18, 1980, the Commission adopted a *Notice of Proposed Rule Making* in the above entitled matter, 83 FCC 2d 51 (1980), to consider modifications in the process for making additional Very High Frequency (VHF) television allotments available.

2. Upon a review of the status of this proceeding, we have determined that it should be terminated without prejudice. In view of the significant amount of time that has elapsed since the initiation of this proceeding, we believe that it would not serve the public interest to attempt to resolve this proceeding based on the existing record. Moreover, the spectrum use issues that are under review in the advanced television/high definition television proceeding and the associated freeze on new television allotments have either superceeded the proposals under review in this proceeding or require prior resolution. *See Notice of Inquiry in MM Docket 87-268*, 2 FCC Rcd 5125 (1987) and *Tentative Decision and Further Notice of Inquiry in MM Docket 87-268*, 3 FCC Rcd 6520 (1988).

3. Accordingly, IT IS ORDERED that BC Docket No. 80-499 IS TERMINATED without prejudice.

4. This action is taken pursuant to authority contained in Sections 4(i) and 303 of the Communications Act of 1934, as amended.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 83-403

In the Matter of

The Commission's policy pursuant to §307(b) of the Communications Act of Granting Comparative Preferences within Metropolitan Areas.

ORDER

Adopted: December 28, 1989; Released: January 11, 1990

By the Commission:

1. On April 15, 1983, the Commission adopted a *Notice of Proposed Rule Making* in the above entitled matter, 48 Fed. Reg. 19428 (1983), to examine several of the Commission's policies concerning comparative preferences within metropolitan areas. Specifically, the proceeding proposed to allot channels to metropolitan areas, thereby permitting interested parties to apply for any municipality within that area without receiving a comparative preference for specifying that municipality.

2. Upon a review of the status of this proceeding, we have determined that it should be terminated without prejudice. In view of the significant amount of time that has elapsed since the initiation of this proceeding and in light of changes within the broadcasting industry and in the Commission's regulations themselves during this period, we believe that it would not serve the public interest to attempt to resolve this proceeding based on the existing record.

3. Accordingly, IT IS ORDERED that MM Docket No. 83-403 IS TERMINATED without prejudice.

4. This action is taken pursuant to authority contained in Sections 4(i) and 303 of the Communications Act of 1934, as amended.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 85-166
Phase II, Part 1

In the Matter of

Investigation of Special Access
Tariffs of Local Exchange Carriers

ORDER ON RECONSIDERATION

Adopted: November 28, 1989; Released: January 19, 1990

By the Commission:

1. In the *Strategic Pricing Order*,[1] the Commission considered the lawfulness of pricing high capacity service (HiCap) and digital data service (DDS) to reflect strategic considerations in addition to relative cost.[2] That Order established a cost crossover ratio and range of reasonableness, and guidelines to evaluate the rates under investigation and to ensure reasonable rates in the future.

2. Following the release of the *Strategic Pricing Order*, the Ad Hoc Telecommunications Users Committee (Ad Hoc), the American Petroleum Institute (API), the BellSouth Telephone Companies (BellSouth), the Independent Data Communications Manufacturers Association, Inc. (IDCMA), and Local Area Telecommunications, Inc. (Locate) filed petitions for reconsideration. [3] In this Order we resolve the issues raised in those petitions. In resolving these issues, we deny the petitions for reconsideration insofar as we affirm the application of the guidelines adopted in the *Strategic Pricing Order* to the strategically set rates subject to this investigation on the basis of the circumstances that existed at that time. We here conclude, however, due to changed circumstances in the special access services market, that there is no further justification for strategic pricing. We therefore expect the LECs to refrain from strategic pricing in the future and to return to cost-based special access rates. Because strategic pricing should now cease, we will no longer provide a set of guidelines for strategic pricing in the future.

I. BACKGROUND

3. On February 19, 1985, and March 8, 1985, the Commission issued orders[4] in its investigation of the initial access charges that resolved many issues relating to special access charges. The Commission concluded, however, that some special access issues required further investigation. The Commission accordingly subjected all special access charges to an accounting order and directed that a new docket be established to examine unresolved issues. The Common Carrier Bureau (the Bureau) issued an order designating the issues for that investigation (CC Docket No. 85-166) on May 24, 1985.[5]

4. The *May 1985 Designation Order* noted that some exchange carriers "apparently had adjusted their rates for certain services to reflect such non-cost-based factors as customer migration from one service to another depending upon relative pricing."[6] That Order contemplated that carriers would be directed to file pleadings discussing the existence and lawfulness of such a practice at a later date. The Bureau did establish a pleading cycle for rate level questions including strategic pricing questions in an Order released January 17, 1986.[7]

5. In the meantime the LECs filed revised access tariffs for the second (October 1985 - December 1986) access period. Many LECs expressly acknowledged that rates for certain special access services in the revised tariffs had been established at levels that exceed relative costs in order to achieve purposes that the LECs described as "strategic" objectives. Various petitions to reject, suspend or investigate tariffs filed on July 2, 1985, asserted that such "strategic" pricing is unlawful and produces rates that are unjust and unreasonable. The Bureau concluded that this question warranted investigation and incorporated the investigation of those "strategic" rates in the ongoing special access investigation in this docket.[8]

6. The *Annual 1985 Access Order* was challenged in applications for review insofar as the Bureau denied petitions to reject rates the LECs described as strategic rates. The Commission affirmed that Bureau decision.[9] The Commission concluded that rejection would not be appropriate because such strategic pricing is not *per se* unlawful.

7. Some LECs filed revised rates for the 1987 access period that would have increased charges that had already been established at levels that exceeded LEC estimates of rates that would recover costs attributable to these services. The Common Carrier Bureau incorporated these revised rates in this investigation and suspended some of the rate increases of some of the carriers.[10] After receiving supplemental pleadings relating to the revised strategic rates, the Bureau issued an Order in this docket declaring the suspended rate increases unlawful.[11] The Bureau found that the carriers had not justified those particular rates in those pleadings.[12] The other 1987 rates remained subject to the outcome of this investigation.

8. The issue of strategic pricing was raised again in the annual 1987, 1988, and 1989 access tariff filings. All of the revised strategically priced rates from annual 1987 and 1988 filings, in addition to the originally-designated 1985 rates, are subject to this investigation.[13] In its *Annual 1988 Access Tariff Order*, the Bureau made those rates subject to this investigation.[14] The rates that became effective on April 1, 1989, are not subject to this investigation; rather, only rates filed in previous access tariff filings are before us in this investigation. To the extent that strategic pricing was an issue in the annual 1989 filings, the Bureau analyzed the showings according to the standards set in the *Strategic Pricing Order*. The showings were generally found to be acceptable, but some carriers were required to revise their rates to come into compliance.[15]

II. THE STRATEGIC PRICING ORDER

9. The *Strategic Pricing Order* reaffirmed the conclusion that the Communications Act "does not preclude factors other than cost from being considered in the ratemaking process."[16] The Commission also concluded that the relevant access charge rule does not require that all special

access subelement charges be based upon an allocation of the special access revenue requirement to particular subelements. *See* Section 69.113(d) of the Commission's Rules, 47 C.F.R. § 69.113(d). The Order interpreted the Section 69.113(b) direction that special access subelement rates reflect costs "as requiring that the hierarchy of special access rates should be consistent with the corresponding hierarchy of reasonably allocable costs, to the extent that such a hierarchy can be discerned."[17]

10. The *Strategic Pricing Order* also concluded that compliance with the overall category rate of return requirement and the cost-price hierarchy requirement is not sufficient to demonstrate that a particular special access subelement rate is just and reasonable. Carriers that departed from cost-based rates to achieve some strategic purpose were required by that Order to demonstrate that their strategic purpose furthers the public interest and that the rates are designed to achieve that purpose.

11. The Commission accepted carriers' claims that deterring uneconomic service bypass and managing demand migration are legitimate public interest objectives. The Commission also said that this conclusion does not answer the further, necessary question of whether the specific rate levels tariffed by the LECs were likely to achieve these objectives.[18] The Commission further noted that preventing rather than controlling migration from voice grade to high capacity facilities would unreasonably hinder customer choice and "exceed the limits of the valid strategic purpose."[19]

12. Inasmuch as the record did not clearly demonstrate that the particular past or current rates were consistent with the standards described in the *Strategic Pricing Order*, the Commission decided to defer a final determination of the lawfulness of those rates. The Commission directed the carriers to file supplemental direct cases analyzing those rates in light of its conclusions. The Commission summarized the applicable guidelines as follows:

> 1. Carriers cannot deviate from the cost allocation and rate of return requirements for the special access category set forth in Part 69 and Part 65 of our rules. The category costs establish the benchmark for evaluating subelement rates.
>
> 2. The hierarchy of any special access rate structure incorporating strategically priced rates must be consistent with the hierarchy of underlying costs for special access services; the rates for less costly services cannot be higher than those for more costly services.
>
> 3. Strategic pricing of subelement rates must further a specific public interest such as reasonably managing demand migration between substitutable services and discouraging inefficient use of the network.
>
> 4. Strategically priced rates cannot unreasonably hinder a customer's choice of access service, the development or implementation of new technologies, and the efficient use of the network.
>
> 5. The strategically set rates must conform to the Commission's requirements for volume discounts set forth in the Volume Discount Practices Order (97 F.C.C. 2d 923 (1984), *e.g.*, the rates must be integrated into the special access rate structure with no restrictions on customers or uses.
>
> 6. The validity and extent of strategic pricing is to be explained and justified *de novo* in each annual access tariff filing.

4 FCC Rcd at 4803.

13. The *Strategic Pricing Order* decreed that high capacity facilities would be deemed to be strategically priced for purposes of applying the guidelines if the rate for a HiCap facility of average length was less than four times or more than eight times the rate for a 4-wire voice-grade circuit of average length. The *Strategic Pricing Order* found that rates within that range are likely to reasonably approximate cost-based rates because the best evidence in the record indicated that the cost crossover point "between voice grade and HiCap services of average length is about 6 4-wire voice grade circuits to 1 HiCap."[20]

III. ROLE OF COST ALLOCATION

A. Strategic Pricing Generally

14. *Petitions*. Virtually all participants accept this Commission's discretion to allow the LECs to include in their pricing methodologies factors in addition to cost. Some petitioners interpret the *Strategic Pricing Order* as abandoning costs as the basis of rate regulation, and assert that this violates the Act. Ad Hoc Petition at 3; Locate Petition at 5.[21] These petitioners assert that the strategic pricing methodology fails to require that the pricing of special access services fully recover the costs of the service. *Id.* IDCMA argues that the LECs should be required to make a strong public interest showing to justify the use of strategic pricing, and that absent such a showing the LEC should be required to develop cost-based prices. IDCMA Petition at 5-9.

15. Locate contends that the departure from the statutory requirement of just and reasonable rates is not only in violation of the Act, but also without rational basis in the *Strategic Pricing Order*. Locate Petition at 7. All petitioners except BellSouth allege that the use of strategic pricing as outlined in the *Order* would permit LECs to price HiCap and DDS services at excessive or non-compensatory rates, to the detriment of the public interest.

16. *Comments and Oppositions*. LECs opposing these petitions state that the strategic pricing policy is reasonable and necessary, that the guidelines provide adequate safeguards, and that the petitioners oppose the policy out of self-interest rather than concern for the public interest. Ameritech Opposition at 5, 20; BellSouth Opposition at 7-9. BellSouth opposes the other petitions, stating that these petitioners dispute the use of any criteria other than cost for ratemaking purposes. BellSouth Opposition at 2. BellSouth argues that these petitioners have misconstrued the effect of the *Strategic Pricing Order* and have failed to recognize that the Commission proposed to add factors to, but not to replace, cost-based rate regulation. *Id.* at 3-7. BellSouth states that the Order's guidelines for evaluation of strategic pricing are effective and serve the public interest, and that the concept of a range of reasonableness is sound. *Id.* at 7-9.[22] Further, Ameritech avers, the just and reasonable standard of the Act does not mandate cost-based rates; the determination of whether rates are just and reasonable is made in this Commission's discretion, and allows for flexibility. Ameritech Opposition at 11-15.

17. IIA expresses alarm at what it perceives as the Commission's abandonment of cost-based rate development, and charges that the guidelines are excessively discretionary in application. IIA Comments at 4. IIA suggests that this Commission ensure that rates that depart from cost-based development must be fully documented, must further a specific and important public interest objective, must be targeted to address that objective and be commensurate in kind and degree with that objective, and must be affirmatively approved by this Commission before going into effect. *Id.* at 5-6. Teleport suggests that this Commission should be narrowing, not broadening, our approach to strategic pricing, in view of the decreasing justification for it. Teleport Opposition at 8.

18. NYNEX argues that the strategic pricing policy is not an abandonment of cost-based rates, and that petitioners have misunderstood the Order. NYNEX Opposition at 2-3. NYNEX explains that the *Order* merely says that cost is not the *only* determinant of rates. Arguments about the practicability of subelement allocation are irrelevant, NYNEX avers, because the Commission has determined that such allocations are not necessary, rather than determining that such allocations are not possible. *Id.* at 4. NYNEX further states that the guidelines established in the *Order* do adequately protect the public interest. *Id.* at 6. NYNEX notes that the petitioners challenge each guideline individually as insufficient, but that the Commission intended the guidelines to operate collectively to safeguard the public interest, and collectively the guidelines are sufficient to this task. *Id.* at 7. SWB argues that the Order does not abandon cost-based rate development, but seeks to determine whether additional factors used in rate development are valid and serve a public interest. SWB Opposition at 2.

19. Teleport opposes BellSouth's petition as urging Commission approval of below-cost pricing. Teleport Opposition at 1. Teleport also supports the petitions of Locate and CompTel as requesting clarification that below-cost rates are not permitted. *Id.* Teleport urges this Commission to recognize the valuable role of alternative local carriers in developing the Nation's communications infrastructure, and the importance of assuring that competition in this field is not truncated by allowing LECs to underprice. *Id.* at 4-6. Teleport emphasizes that in its view the *Strategic Pricing Order* does not authorize below-cost pricing, as the range established in the Order was an acknowledgment of variations among LECs, not of the desire to allow any LEC to price below its costs. *Id.* at 6 (citing *Strategic Pricing Order*, 4 FCC Rcd at 4805). Teleport stresses that the emphasis in the investigation has been on overpricing, not below-cost pricing, and that below-cost pricing would conflict with other Commission policies. *Id.* at 6-7.

20. *Replies*. Ad Hoc replies that it has not suggested that this Commission not consider factors in addition to costs in our determination of whether rates are just and reasonable, but that it is convinced that the latitude allowed by the *Strategic Pricing Order* represents an impermissible departure from cost-based pricing. Ad Hoc Reply at 2. Ad Hoc counters opposition assertions that rates remain cost-based by arguing that this cannot be so when calculation of costs of individual services is not required. *Id.* at 3. API reasserts its position that cost-based rates remain the preferable policy, and can be implemented without undue costs or difficulties. API Reply at 1-3. API argues that, while the LECs strain to emphasize that the Commission's guidelines do consider costs, a review of the LECs' direct cases reveals that the cost of HiCap service is four to five times greater than the cost of a VG circuit. *Id.* at 5.

21. Locate replies that the oppositions have misstated Locate's position, and that Locate never argued that ratemaking must be solely cost-based. Locate Reply at 1-2. Locate questions the validity of the particular guidelines established in the *Strategic Pricing Order*, not the Commission's discretion to consider factors other than costs. *Id.* Locate takes issue with those oppositions that argue that the guidelines are sufficient to protect against anticompetitive pricing because strategic prices are not anticompetitive so long as they are above incremental cost; Locate agrees with this statement, but notes that the guidelines do not mention incremental costs, and the Commission does not state that covering incremental costs is a requirement. *Id.* at 7.

B. Allocation and Regulation on a Subelement Level

22. *Petitions*. Numerous petitioners argue that the Act's requirement of just and reasonable rates means that each and every (*i.e.*, subcategory or individual service) rate must be shown to be just and reasonable on a cost allocation basis.[23] API, for example, contends that cost allocation below the category level is practicable and necessary, and that consistent application of reasonable allocation principles will yield a result that is reasonable. API Petition at 15-18. The failure to require per-service allocation and regulation, according to these petitioners, is a failure to assure that rates are rationally related to costs, in violation of statutory standards.[24] These petitioners assert that regulating only to the category level leaves the LECs too much latitude and increases the likelihood of anticompetitive pricing and cross-subsidization.

23. The pleadings also discuss the practicability and reliability of cost allocation on a subelement level. Petitioners state that per-service allocations are practicable, and that our accounting rules are adequate to generate reliable cost data on an individual service basis. Locate Petition at 8-11. Such petitioners note that LECs' use of individual case basis, or ICB, rates for various individual DS3 services demonstrates this. Ad Hoc Petition at 7-9. Some petitioners draw comparisons to allocations made for separations purposes. API Petition at 15.[25]

24. Some petitioners assert that subelement cost allocations are necessary at least to the extent of arriving at a benchmark for our evaluation of strategically priced rates. API Petition at 17. Ad Hoc argues that the *Strategic Pricing Order* is inconsistent in rejecting per-service rate regulation, since the ratio the Commission adopted as the basis of the range of presumed reasonableness is based on the calculation of per-service (VG and HiCap) costs. Ad Hoc Petition at 10. API notes that per-service cost analysis was the basis for the Bureau's rejection of rates in its *Rejection Order*, and asserts that nothing has changed that should justify a departure from that approach. API Petition at 15-16.

25. *Oppositions*. The LECs respond that the public interest is sufficiently protected if we assure that the rates are just and reasonable on the category level; since any over- or under-pricing must be balanced by other rates within the special access category, they state, no individual rate will depart significantly from the authorized rate of return. LECs argue further that a requirement of subelement allocation would impose a significant and unjustifiable burden, especially in view of the numerous

and diverse special access service offerings, and that such allocations are by their nature, and unavoidably, unreliable. Ameritech argues, for example, that the use of cost allocation at the individual service level would distort market decisions. Ameritech Opposition at 3.[26] The relevant statutory consideration, Ameritech contends, is not whether a cost allocation has been made or whether a single service return is just and reasonable, but whether a carrier's rates are just and reasonable -- which can be determined using our guidelines. *Id.* at 15.

26. BellSouth contests petitioners' assertions that rate of return regulation at the sub-element level is practicable, arguing that such evaluation would be unreliable and administratively unworkable. BellSouth Opposition at 10-11. US West agrees. US West Opposition at 4-7. BellSouth also contends that comparing cost allocation at the subelement level to jurisdictional or separations processes (or to cost allocation procedures for regulated and non-regulated services) is inapt. *Id.* GTE states that this Commission need not employ service-specific earnings ratios in order to evaluate rates, but has discretion to choose the method by which it will assure that rates are just and reasonable. GTE Opposition at 3. GTE argues that historically the LECs have not been required to provide subelement cost data, and that the *Strategic Pricing Order* may represent a reduction, rather than an increase, in LEC pricing flexibility. *Id.* at 4. GTE supports the Commission's evaluation of the usefulness, rather than the possibility, of per-service regulation, as well as our conclusion that such allocation and regulation would not be useful. *Id.* at 5-8.

27. SWB asserts that there is no reliable way to compute subelement costs, or subelement rates of return, if common costs are present. SWB Opposition at 4-5. SWB clarifies its ICB filings and explains that individual rates are allocated by a "bottoms up" rather than a "top down" fully distributed cost basis. SWB says the petitioners have confused cost identification with cost allocation. *Id.* at 6. SWB also states that subelement cost allocations and rates of return would not be useful for determining the existence of predatory pricing or cross-subsidization, because such cost allocations have no relationship to incremental costs, which are the relevant benchmark for addressing those issues. *Id.* at 7-10.

28. *Replies*. Ad Hoc asserts that LECs can readily allocate costs among individual services; Ad Hoc contends that several LEC opposition filings implicitly acknowledge this, and notes that LECs have made such allocations when allocations served their own purposes. Ad Hoc Reply at 6-7. API reasserts its position that cost-based rates remain the preferable policy, and can be implemented without undue costs or difficulties. API Reply at 1-3. Further, API argues, the supplemental direct cases in this proceeding confirm that the LECs are presently using methodologies to develop service-specific costs for the special access services. *Id.* at 3. API argues that, while the LECs strain to emphasize that the Commission's guidelines do consider costs, a review of the LECs' direct cases reveals that the cost of HiCap service is four to five times greater than the cost of a VG circuit. *Id.* at 5. API too argues that the supplemental direct cases in this proceeding confirm that the LECs are presently using methodologies to develop service-specific costs for the special access services. API Reply at 3.

C. Discussion

29. As the Commission observed in the *Strategic Pricing Order*, costs are traditionally and naturally a benchmark for evaluating the reasonableness of rates. *See Strategic Pricing Order*, 4 FCC Rcd at 4800. Insofar as some petitioners contend, however, that the Communications Act requires that all rates for all services be based solely upon the results of some fully distributed cost (FDC) methodology, we again reject that claim. Although FDC pricing is one method of deriving rates that can be described as just and reasonable, FDC pricing is not, and never has been, the only acceptable method of ratemaking for any carrier. *See e.g., Guidelines for Dominant Carriers' MTS Rates and Rate Structure Plans*, CC Docket No. 84-1235, FCC 85-540, 50 Fed. Reg. 42945 (Oct. 23, 1985).

30. No new arguments have been presented that cause us to depart from the conclusion that the Act does not preclude consideration of factors other than cost in the ratemaking process.[27] Petitioners' reliance upon two prior Bureau Orders is not persuasive.[28] Since the *GTE Telenet Order* was vacated, that Order clearly has no precedential effect. Orders that become moot during the pendency of an appeal are vacated in order to eliminate the precedential effects of such a decision. The Bureau's *Rejection Order* merely represents the Bureau's interim resolution of strategic pricing questions pending a Commission resolution. A claim that a decision departs from previously expressed views of a subordinate unit is not a basis for reconsideration. Moreover, that Bureau Order did not adopt the view that the Act, this Commission's rules or prior Commission decisions preclude consideration of factors other than cost.

31. The Commission also concluded in the *Strategic Pricing Order* that it would not be desirable to require an FDC-derived rate of return constraint to define the outer limits of special access subelement pricing flexibility for the period under investigation. The Commission found that departures from cost-based pricing could be justified if they furthered legitimate strategic purposes and concluded that rates designed to fit a rate of return constraint might be too high or too low to achieve such strategic purposes. Petitioners have not presented any argument that persuades us to reconsider the conclusion that, during the period under investigation, the use of an FDC-derived rate of return constraint to define the boundaries of strategic pricing would be inappropriate.

32. Some arguments summarized in this section may relate to the prospective application of the strategic pricing guidelines rather than to the determination of the lawfulness of the acknowledged departures from cost-based pricing that occurred in the past. Although we affirm the guidelines as they apply to past rates, our conclusion that strategic pricing will not be justified in the future necessarily compels a different approach to future rates. We examine future pricing in Part V of this Order. We turn next to a review of petitioners' contentions that the guidelines, adopted in response to the LECs' past instances of strategic pricing, should be modified or reversed.

IV. SPECIFIC GUIDELINES

A. First Guideline: Category Cost Allocation and Rate of Return

33. *Discussion*. The first guideline required compliance with the rate of return requirement for the special access category as a whole.[29] None of the petitions has questioned this requirement and we accordingly reaffirm the applicability of that guideline in evaluating past examples of strategic pricing.

B. Second Guideline: Cost and Rate Hierarchy

34. The second guideline established in the *Strategic Pricing Order* required a pricing "hierarchy," stating that "the rates for less costly services cannot be higher that those for more costly services." *Strategic Pricing Order*, 4 FCC Rcd at 4803.

35. Ad Hoc argues that the hierarchy guideline, like the volume discount guideline, seeks to assure that rates are reasonable but does not offer any protection against exploitive pricing.[30]

36. *Discussion*. No petition suggests that this Guideline was undesirable. At most, Ad Hoc seems to argue that compliance with this guideline will not be sufficient to ensure that rates are lawful. We accordingly reaffirm our application of the second guideline.

C. Third Guideline: Public Interest Objective

37. Our third strategic pricing guideline required that the LEC must demonstrate that its strategic pricing practices further "a specific public interest . . . ." *Strategic Pricing Order*, 4 FCC Rcd at 4803. No petitioner suggests that we retract this requirement, but some petitioners dispute our conclusions that deterring service bypass and managing migration would serve "a specific public interest."

1. Uneconomic bypass as justification for strategic pricing

38. *Petitions*. Some petitioners argue that the *Strategic Pricing Order* acknowledges that bypass and stranded investment problems are disappearing, so there is no remaining justification for strategic pricing. Further, petitioners argue, even if one assumes that uneconomic bypass continues, and that it is desirable to reduce it, the LECs have shown no connection between this goal and their use of strategic pricing. *See, e.g.*, Ad Hoc Petition at 15-16; API Petition at 9-12.

39. *Comments and Oppositions*. GTE responds that petitioners have challenged strategic pricing justifications, such as reduction of uneconomic bypass, that LECs have not yet presented. GTE Opposition at 10-11. GTE argues that petitioners' challenges are premature, and should be ignored. *Id.* Pacific agrees. Pacific Opposition at 9. The issue is not discussed in reply comments.

40. *Discussion*. The *Strategic Pricing Order* states that the danger of uneconomic bypass can provide a justification for the strategic pricing by the LECs to date. We affirm the *Strategic Pricing Order* in its approval of strategic pricing as an interim solution to the service bypass incentive resulting from the high CCL rates. The effect of the Commission's policies to reduce the potential for uneconomic bypass, however, means that uneconomic bypass will no longer provide a sufficient justification to allow any strategic pricing in the future.

41. Switched access rates have, since their inception, included Carrier Common Line (CCL) rates to recover a portion of local exchange costs. At the beginning, CCL rates were substantial, amounting to 10.48 cents per minute for both ends of a call.[31] When switched access rates included high non-economic CCL rates to recover a portion of local exchange costs, the result was a significant incentive for large users to bypass the switched network by using special access services. HiCap is a primary means of such bypass, as indicated, for example, by its use in various major new interexchange carrier service offerings. In those circumstances, setting HiCap's price at a level that reduced the artificial price advantage of bypass encouraged more efficient use of the switched network in the long run, although at the risk of discouraging some usage of HiCap for other, non-bypass purposes.

42. Various actions the Commission has taken during the past few years have, however, made the uneconomic service bypass problem increasingly less acute. Most importantly, the Commission, on the recommendation of a Federal-State Joint Board, has implemented a Subscriber Line Charge program--reducing the amounts collected through CCL rates by billions of dollars annually. The industry average premium CCL rate for both ends of an MTS call now stands at 2.53 cents per minute.[32] In addition, the Commission has implemented the direct assignment of WATS lines to the special access separations category to deter uneconomic bypass for particular services. Thus, the effect of our policies to reduce the potential for uneconomic bypass means that such bypass will no longer provide a sufficient justification to allow any strategic pricing in the future.

2. Management of migration, reduction of stranded investment as justification for strategic pricing

43. *Petitions*. Petitioners argue that the Commission has incorrectly assumed that HiCap's value is almost solely as a volume-discounted substitute for VG service.[33] They argue, first, that the migration away from VG is due to desirable (and idiosyncratic) characteristics of HiCap itself rather than to a mere desire to replace or discount voice service. Ad Hoc Petition at 16, 18-20, 23-25; API Petition at 13-14. Second, they contend, VG service migration is to the switched network as well as to HiCap. Ad Hoc Petition at 17-18. Third, petitioners assert, even if migration does exist, it does not necessarily require "managing," and if it does, the LECs are not necessarily the right managers. Fourth, petitioners contend, the resulting unused plant is spare plant, not stranded investment, and it does not in any case have any significant negative impact on network efficiency. Ad Hoc Petition at 16; API Petition at 10-11. Finally, petitioners argue, the LECs have failed to show the efficacy of strategic pricing in bringing about this result. Ad Hoc Petition at 16.

44. *Oppositions and Comments*. The LECs insist that the conclusions reached in the *Strategic Pricing Order* are correct, justified, and necessary. Some affirm that HiCap service is primarily a volume-discount replacement for VG. Ameritech Opposition at 3; NYNEX Opposition at 8-9. Other LECs state that the *Strategic Pricing Order* did not find that HiCap is solely or exclusively a volume discount substitute for VG, and that the conclusion that it

can function as such supports the pricing policy established in the *Order*. GTE Opposition at 11; Pacific Opposition at 8-9.

45. Some LECs also claim to have experienced considerable losses due to stranded investment when customers switch from VG to HiCap services. Petitioners argue that the VG circuitry remaining after such a switch is spare and can be used for other purposes, that the LECs maintain substantial spare circuits of which this is but a very small part, and that the existence of this spare circuitry cannot justify strategic pricing.[34]

46. *Replies*. API reiterates its argument that the rationale for strategic pricing, to establish a desired rate relationship between HiCap and VG special access, is wrong because HiCap is not a volume discount VG substitute. API Reply at 6-7. The LEC view, API states, is dated, simplistic, and wrong. *Id.* at 8. API asserts that the only LEC that bothered to analyze carefully the variety of offerings of HiCap, Rochester Telephone, was prompted by this analysis to abandon strategic pricing. *Id.* at 9. Finally, API suggests that if stranded investment is a real problem (an assumption API does not admit), it should be addressed directly, by accelerated amortization, rather than indirectly, through strategic pricing. *Id.* at 10.

47. Ad Hoc asserts that stranded investment is a very minor consideration, and argues that the LEC opposition comments have either abandoned this argument or have failed to support it. Ad Hoc Reply at 9. Ad Hoc repeats its assertion that the decrease in VG demand is due partly to migration to switched services, and notes that several LECs have acknowledged that this is the case. *Id.* at 8.

48. *Discussion*. The pleadings appear to reflect a misunderstanding of the findings and conclusions in the *Strategic Pricing Order* regarding special access service migration. While the Commission concluded in that *Order* that management of migration was a public interest objective that could then justify strategic pricing, and that most of the LECs had already made persuasive showings that migration management serves the public interest, the *Order* also concluded that strategic pricing could have the inefficient result of compelling customers to stay with outdated and inefficient services rather than changing to new and more efficient ones. *Strategic Pricing Order*, 4 FCC Rcd at 4804. Accordingly, the *Strategic Pricing Order* did not find that any particular level of strategic rates was or has been necessary to manage demand migration. The Commission directed the LECs to file supplemental pleadings to permit definitive conclusions.

49. We affirm the finding in the *Strategic Pricing Order* that the LECs had stated valid public interest reasons to set past HiCap rates strategically in order to manage the migration of usage from VG to HiCap so as to moderate inefficiencies and churn.[35] We also recognize that, if migration is occurring, perhaps it is for the very reasons of market selection and technological development that the Commission has established as its goals. We find that this rationale was acceptable, in the highly uncertain environment accompanying the AT&T divestiture and the implementation of the new regulatory regime of access charges, based on unusally high growth in demand for HiCap and the problems potentially caused by the underrecovery of relevant costs in LEC nonrecurring charges (NRCs). As interexchange carrier services using HiCap entrance facilities have developed a market, use of LEC HiCap services has expanded dramatically. From mid-1986 to mid-1987, for instance, BOC HiCap services increased by 97 percent. This rapid movement from VG to HiCap services created significant problems for the provisioning of service and for efficient network planning. In addition, NRCs, which are imposed by the LECs to recover the one-time costs of installing, removing, or reconfiguring special access facilities, generally were significantly below the costs of installing and removing facilities. In the *NRC Order* in this docket, the Commission concluded that non-recurring costs should be recovered through NRCs alone. In the interim, however, non-cost-based NRCs led to higher recurring charges than would otherwise have been the case and artificially encouraged churn between voice-grade and HiCap services by understating the true economic costs of switching services.

50. The LECs' response to the problems they faced as a result of these circumstances was to attempt to manage demand migration by strategically pricing their HiCap rates. In the highly uncertain environment that prevailed at the time the rates under investigation in this docket were filed, this was a justifiable response.

51. Circumstances have now changed. The one-time dislocations of the AT&T divestiture and the initiation of access charges are now problems of the past, so that there is more certainty in LEC planning processes for future special access services. Growth in HiCap services amounted only to 29 percent from September 1987 to September 1988. In addition, the transition to cost-based NRCs has minimized unnecessary and uneconomic facility churn. Moreover, the experience the LECs gained in dealing with the unexpectedly sharp increase in the initial demand for HiCap service should leave them better prepared to respond to rapid increases in demand for future new services without having to control migration of demand to such services through strategic pricing. For all of these reasons, we conclude that, as with bypass, the circumstances that made management of VG to HiCap demand migration a reasonable justification for the strategic pricing of HiCap services in the past will not exist in the future.

D. Fourth Guideline: Customer Choice

52. The fourth guideline required that strategic pricing "cannot unreasonably hinder a customer's choice of access service, the development or implementation of new technologies, and the efficient use of the network." *Strategic Pricing Order*, 4 FCC Rcd at 4803.

53. *Petitions*. While most of the pleadings do not discuss the fourth guideline specifically, API does assert that this guideline is inapplicable to HiCap and VG, which are not substitutable services, and that it is unclear what the demand data are intended to prove. API Petition at 20.[36] IDCMA states that the fourth guideline, applied in combination with the third, should leave very little room for the strategic pricing of special access services. IDCMA Petition at 19.[37] But IDCMA doubts that this Commission will enforce the guidelines in a way that will enhance their effectiveness, and states that it has been chagrined at the acceptance by this Commission of LEC justifications for strategic pricing. *Id.* at 20.

54. *Oppositions*. Ameritech responds that there is positive evidence that the strategic pricing guidelines are effective. It says that whenever HiCap is an efficient substitute service, the entities serving those markets have not sought reconsideration of the *Strategic Pricing Order*. Ameritech Opposition at 4. Furthermore, Ameritech asserts, the guidelines serve merely as an aid to a "preliminary deter-

mination" of reasonableness of rates, to assess whether suspension and further investigation are necessary. *Id.* at 5. BellSouth contends that the guidelines are effective, and that they do not displace traditional tariff review processes. BellSouth Opposition at 6-7.

55. The LECs argue in the supplemental direct cases that the growth of HiCap demand proves that strategic pricing has not hindered customer choice. *See, e.g.,* BellSouth Direct Case at 14. They also assert that strategic pricing has not impeded customer choice in leaving VG services. Commenters assert that the mere fact of growth of demand for HiCap service does not prove that strategic pricing has not hindered customer choice. *See, e.g.,* Arinc Opposition at 10-11. Several commenters argue that HiCap growth is stimulated by non-cost considerations (technical and otherwise), and that overpricing of HiCap has impeded customer selection. API contends that, by pricing VG unreasonably low, LECs have impeded customer selection of switched services, thereby exacerbating any existing bypass problems. API Opposition at 2-4, 13.

56. *Discussion.* We affirm the *Strategic Pricing Order* conclusion that this guideline provided substantial assurances in the justification of strategic pricing. We are also not persuaded by petitioners' or opponents' arguments that this guideline was an inadequate safeguard. Ameritech demonstrates that its HiCap rates, "which must meet the Commission's regulatory standards, compare favorably with the prices for nonregulated substitutable services set by competition alone."[38] We conclude that BellSouth is correct in asserting that "[i]f strategic pricing had in fact erected any significant impediment to the exercise of customer choice, this hindrance would be reflected in a static pattern of High Capacity demand and increasing growth in voice grade demand."[39]

E. Fifth Guideline: No Restrictions

57. The fifth guideline required that strategically set rates "must be integrated into the special access rate structure with no restrictions on customers or uses." *Strategic Pricing Order*, 4 FCC Rcd at 4803. None of the petitions appears to challenge this guideline. We accordingly reaffirm its application in evaluating past instances of strategic pricing.

F. Sixth Guideline: *De Novo* Justification

58. The sixth guideline required that carriers using strategically set rates file a *de novo* justification of those rates, based on these guidelines, with each annual access tariff filing. No party challenged this guideline, and we accordingly reaffirm its incorporation in our prior decision establishing guidelines, but note our prospective determination here that strategically set rates will no longer be justified.

V. FUTURE FILINGS

A. The Cross-over Ratio and Range of Reasonableness[40]

59. *Petitions.* Most petitioners challenge the concept and the development of the cross-over ratio as a means of establishing a range of reasonableness for evaluating future tariff filings. These petitioners assert that the concept of a universal, across-the-board economic cross-over ratio is insupportable, and that the Commission has created an insoluble inconsistency by insisting that subelement-level allocation and regulation are impracticable, then basing our entire strategic pricing structure on a cross-over based on subelement cost development.[41]

60. Most petitioners assert that the particular ratio chosen was developed by NYNEX without explanation or support, and was adopted by the Commission with little elaboration.[42] BellSouth challenges the ratio as unrepresentative and cites the range of individual LEC ratios. BellSouth Petition at 2. BellSouth petitions for reconsideration on the basis that the allowable "range of reasonableness" should consist of a zone 30 percent above or below each LEC's individual cross-over ratio. *Id.*[43] Other petitioners contend that the Commission's use of this ratio is both conceptually and numerically arbitrary and capricious.[44] Several petitioners argue that the Commission's creation of a "range of reasonableness" (the presumption that a rate is reasonable if it is within 30 percent, plus or minus, of the 6:1 ratio) is not adequately supported. Some state that if a range is to be used, it should be a narrower range, as the one established in the *Order* is too broad to provide a meaningful safeguard.[45]

61. *Comments and Oppositions.* The other LECs reply that the range established is reasonable and that the guidelines provide adequate safeguards. The LECs and the commenters interpret our stated "presumption of reasonableness" with varying degrees of certitude, some stating that any rate within or close to the range is, *ipso facto*, acceptable, while others argue that even a rate in the middle of the range can be *prima facie* unreasonable. Ameritech states that the evidence shows that the strategic pricing guidelines work; where HiCap is an efficient substitute service, the entities serving those markets have not sought reconsideration of the Commission's decision. Ameritech Opposition at 3.

62. *Replies.* In the further investigation, only Locate challenges BellSouth for its presentation of a 16:1 crossover ratio in the direct case. Locate Opposition at 2-3. Locate also argues that the crossover ratios presented by the LECs are unreliable because the LECs use different rates to compute their ratios, and have differing definitions of average length of haul (ALOH). *Id.* at 3-6.[46] Locate also rejects oppositions' assertion that the range of presumed reasonableness is not too broad, and shows an example of significant HiCap price reduction that, unsupported by cost data, would fall within the range and thus be presumed reasonable. Locate Reply at 7-9. Locate reiterates that, while the requirement that total costs be recovered at the category level constrains LEC price movements to some degree, it still leaves an unreasonably wide zone within which rates can be adjusted without any special justification. *Id.* at 9. Locate contends that the annual 1989 access tariff filings show reduced HiCap and increased VG rates, the exact opposite effect from that intended by the Commission. *Id.*

B. Other Comments on the Adequacy of Safeguards

63. *Petitions.* Several petitioners assert that the guidelines established in the *Strategic Pricing Order* provide no protection against LEC exploitive pricing, that the range of reasonableness provides LECs excessive flexibility, and that the range of reasonableness approach fails to protect ratepayers from LEC market control. Ad Hoc argues, for example, that both the hierarchy guideline and the volume discount guidelines seek to assure that rates are reasonable, but that neither offers any protection against exploitative pricing.[47] Some argue, too, that the range of

reasonableness will allow the LECs to price below cost and thus harm emerging competition. The Competitive Telecommunications Association (CompTel) requests clarification of the *Strategic Pricing Order* to establish the requirement that the pricing of special access services and each subelement thereof must fully recover the costs of the service or subelement. CompTel Petition at 1. CompTel is concerned that the Commission's alleged de-emphasis of cost recovery objectives in special access pricing might be interpreted to permit LECs to price below cost and thereby injure emerging competition. *Id.* at 2.

64. Ad Hoc argues that all the guidelines depend on strict interpretation and enforcement. Ad Hoc Petition at 12. If, for example, a carrier can satisfy the fourth guideline (customer choice) merely by showing increased demand despite above-cost pricing of HiCap service, then the guideline affords no protection to ratepayers. *Id.* Petitioners generally challenge the adequacy and effectiveness of the guidelines in protecting the public interest.[48] They argue that the hierarchy of costs developed in the guidelines will be ineffective in establishing just and reasonable rates, and that the category rate of return is an inadequate safeguard. Locate Petition at 12-17.

65. Further, several petitioners assert that the *Order* relies on the existence of substantial viable competition in the HiCap market, and such competition does not yet exist.[49] If the LECs are allowed the flexibility and latitude that the *Strategic Pricing Order* suggests, they argue, such competition as does exist will be truncated by predatory LEC pricing.[50]

66. Finally, some parties argue, the institution of strategic pricing under the proposed guidelines deprives users and competitors of any meaningful means of redress. The complaint process will be virtually useless, they contend, as it shifts the burden of proof from the LEC to the challenger, while failing to allow for any means of collecting data from the LEC. Ad Hoc, for example, states that a LEC can defend any challenged rate simply by showing that earnings for the category as a whole are within permissible limits. Ad Hoc Petition at 10. *See also* IDCMA Petition at 10-17.

67. *Comments and Oppositions*. Ameritech states that these petitions are flawed both legally and factually, and that the flaws are compounded by petitioners' failure to recognize that the purpose of rate regulation is to serve as a surrogate for competition where competition does not exist, not to micromanage the LECs. Ameritech Opposition at 1-2. Further, Ameritech argues, the petitioners have overreacted to the methodology established in the *Order*, since the range of reasonableness and the guidelines create only a presumption, a rough preliminary determination of the acceptability of the proposed tariff structure. *Id.* at 5. Ameritech says the tariff rates remain subject to the complaint and investigation procedures. *Id.* at 21. Ameritech asserts that the Commission has simply said that if strategically priced rates fall within certain parameters, it will devote its limited resources to matters other than suspending and investigating those tariffs on its own initiative. *Id.* at 23. GTE agrees. GTE Opposition at 8-9.

68. Pacific states that competition does exist in the HiCap market, and that a requirement of subelement-level allocation and regulation would stifle the development of this competition. Pacific Opposition at 2. Pacific argues that the Order's guidelines assure just and reasonable rates, and that the contrast between Ad Hoc's and IDCMA's assertions of overpricing, with Locate's assertion of underpricing, emphasizes this. *Id.* at 4. US West counters Locate's and CompTel's arguments regarding below-cost pricing by stating that these concerns are speculative, and that other Commission rules and policies protect against predatory pricing. US West Opposition at 11.

69. Focus submits a letter in support of Locate's petition, and states that the Order allows LECs to underprice, which can impair competition. Focus Comments at 1. Focus also accuses the Commission of abandoning cost-based regulation without adequate support for doing so, thus abandoning our duty to the public interest. *Id.* at 1-2. The consumer has no adequate means of redress if it cannot insist that the LECs adhere to cost-based rate development. *Id.* at 2.

70. *Replies*. Locate argues that the oppositions overstate the existence and viability of competition in the HiCap market. Locate Reply at 2-3.[51] Locate states that the classification of LECs as dominant carriers was and is based on their possession of market power, not on the absence of competitors. *Id.* at 3-4. Locate argues that the guidelines are insufficient to restrain anticompetitive pricing by the LECs. *Id.* at 5. Further, Locate states, it is unclear whether the presumption and guidelines will be applied instead of, or in addition to, traditional tariff review procedures; this should be clarified by this Commission. *Id.* at 6. Ad Hoc also disagrees with oppositions' argument that the HiCap market is competitive, and says that these parties have confused the presence of competitors in certain geographic market sectors, with the existence of meaningful competition. Ad Hoc Reply at 4.

71. BellSouth replies to parties opposing its proposal of idiosyncratic crossover points that this proposal promotes the goals of the *Strategic Pricing Order* and has not previously been addressed by the Commission. BellSouth Reply at 1-2. BellSouth argues that opponents have failed to recognize the considerations that motivated the Commission to adopt a crossover. *Id.* at 3. BellSouth responds to Teleport and other oppositions that adoption of its proposal would not constitute authorization to price below cost, and states that rates below fully distributed costs do not equate to below-cost pricing. *Id.* at 4-5. BellSouth argues, further, that FDC allocation is not appropriate in a competitive environment, which -- it says -- Teleport has acknowledged is the case here. *Id.* at 6-8.

72. *Discussion*. We reaffirm in this Order the application of the guidelines developed in the *Strategic Pricing Order* to the particular rates for the specific period under investigation in this docket. As we have noted, however, the circumstances that the LECs have cited in the past, which we find in our companion *Final Order* were adequate to justify much of past strategic pricing, will no longer obtain in the future. The uncertainty and dislocation caused by the AT&T divestiture and the implementation of the new access charge regime are now problems of the past -- not of the present or the future. Uneconomic CCL rates and NRCs, along with the problems to which they gave rise, also are now primarily behind the industry. Finally, the experience that the LECs have gained in dealing with the introduction of new services should leave them better prepared to respond to rapid increases in demand for future new services. The LECs must now look to their own business planning to deal with marketplace changes. We conclude, therefore, that strategic pricing of special access service will no longer be

justified. Because the justifications for strategic pricing will no longer exist, we expect the LECs henceforth to refrain from filing strategically set rates. As a result, we will no longer provide a set of guidelines for the strategic pricing of the LECs' special access rates in the future.

73. It is our view that, because strategic pricing is no longer justified, the LECs must implement more fully cost-based pricing of special access service. It is for this reason that we reaffirm the cost crossover range concept. Petitioners have not presented persuasive reasons for abandoning this approach. We do not believe, for example, that the use of a crossover range for purposes of identifying strategic pricing is inconsistent with our decision to refrain from using or prescribing a particular cost allocation methodology for subelement rates. Rather, we believe that the crossover range represents a reasonable surrogate for detailed cost allocations. As the Commission found in the *Strategic Pricing Order*, the six to one ratio represents the most likely approximation of the cost relationship between HiCap and VG services based on the record.[52] Nothing produced in the record on reconsideration has convinced us otherwise. The 4 to 8 range should be broad enough to encompass a "cost-based" rate that might be produced by any rational cost allocation methodology used by an exchange carrier in the near future. None of the petitioners has demonstrated that some other crossover range would be more suitable for our purpose. Indeed, API, which seeks reconsideration of the Commission's guidelines, also concludes that the record supports a crossover ratio of between four and five to one, well within the range of reasonableness established by the Commission. *See* API Reply on 5. Accordingly, we affirm the range of reasonableness around a cross-over point of 6 VG circuits to one HiCap circuit -- *i.e.*, from 4 to 8 VG circuits to one HiCap circuit --as a reasonable approximation of cost-based pricing. Carriers that propose rates that do not fall within this range will be required to file additional cost justification to support any such rates.

74. The crossover range is, of course, designed to serve as a tool to aid us in identifying rates that warrant investigation. Adoption of a crossover range does not foreclose LECs, for instance, from demonstrating that rates that fall outside the range are lawful because they reasonably reflect a particular LEC's costs. The presumption of reasonableness also does not conclusively establish the lawfulness of rates that do fall within the range we have adopted. A showing that a high capacity facility rate falls within the 4 to 8 crossover range would not be sufficient to justify dismissing a Section 208 complaint alleging that a particular rate is unjust and unreasonable.

75. We decline to adopt the BellSouth suggestion that we adopt different crossover ranges for different carriers. Any effort to identify a correct crossover point for each carrier is likely to be nearly as burdensome as prescribing detailed cost allocation methods suggested by some petitioners. For the purpose of identifying a presumptive range of reasonableness outside of which rates require special justification, we conclude that using a single range for all carriers is reasonable. We are not convinced that individual crossover ranges for each carrier are required in order reasonably to reflect costs. We recognize, of course, that costs of VG and HiCap services are likely to vary somewhat among carriers, even if we adopted a uniform cost allocation scheme. Nevertheless, we do not believe that these variations should be unreasonably large because the basic technologies used to deliver these services are largely standardized. Moreover, we believe that the range that we have already established -- *i.e.*, 30 percent above and below the approximate cost crossover point -- should be adequate to account for such cost variations among carriers. BellSouth has not convinced us otherwise. In any event, carriers whose rates exceed the presumptive range of reasonableness may demonstrate that their rates are lawful by providing cost justification.

76. Finally, several parties argue that the Commission's strategic pricing policy was predicated upon a mistaken conviction that true and viable competition exists in this area, and that the policy must be rejected due to the lack of such competition. We reject these claims. Competition in the HiCap service market is in its early stages. However, while this policy was meant to supplement competitive forces where they exist, it was not predicated upon the existence of viable competition. As noted above, however, we now conclude that strategic pricing by the LECs can no longer be justified.

VI. CONCLUSION; ORDERING CLAUSE

77. We affirm our establishment of the cost crossover ratio, which establishes the range of presumed reasonableness, as well as the application of the guidelines to strategically set rates that existed in the past. We conclude, however, that, in view of changed circumstances, there is no further justification for strategic pricing. We therefore expect the LECs to refrain from strategic pricing in the future and to return to cost-based special access rates. Because strategic pricing should now cease, we will no longer provide a set of guidelines for strategic pricing in the future.

78. Accordingly, IT IS ORDERED that the petitions for reconsideration of the Ad Hoc Telecommunications Users Committee, the American Petroleum Institute, the BellSouth Telephone Companies, the Independent Data Communications Manufacturers Association, Inc., and Local Area Telecommunications, Inc., ARE DENIED TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Attachment A

PLEADINGS IN CC DOCKET NO. 85-166, PHASE II, PART 1

Further Investigation

[SIRATEGIC PRICING]

1. (Supplemental) Direct Cases

The Ameritech Operating Companies
The Bell Atlantic Telephone Companies
The BellSouth Telephone Company
Cincinnati Bell Telephone
Nevada Bell
The NYNEX Telephone Companies
Pacific Bell
Rochester Telephone Corporation
Southern New England Telephone Company
Southwestern Bell Telephone Company
Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company, and Pacific Northwest Bell Telephone Company (US West)

2. Comments and Oppositions

The Ad Hoc Telecommunications Users Committee (Ad Hoc)
Aeronautical Radio, Inc. (Arinc)
American Petroleum Institute (API)
American Telephone and Telegraph Company (AT&T)
International Communications Association (ICA)
Local Area Telecommunications, Inc. (Locate)
MCI Telecommunications Corporation (MCI)

FOOTNOTES

[1] Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, Phase II, Part 1, Memorandum Opinion and Order, 4 FCC Rcd 4797 (1988) (*Strategic Pricing Order*).

[2] The Common Carrier Bureau established this docket to investigate special access rate levels, rate structures, and rate relationships arising from the special access tariffs that became effective on or about April 1, 1985. *See* Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, Mimeo No. 4726, released May 24, 1985 (Com.Car.Bur.) (*May 1985 Designation Order*). In Phase I we completed our investigation of most of the rate structure and cost allocation issues. *See Strategic Pricing Order*, 4 FCC Rcd at 4797 n. 1.

[3] Comments or oppositions were filed by the Ameritech Operating Companies (Ameritech), BellSouth, the Fiber Optic Corporation of the United States (Focus), GTE Service Corporation (GTE), the Information Industry Association (IIA), the NYNEX Telephone Companies (NYNEX), Nevada Bell and Pacific Bell (Pacific), Southwestern Bell Telephone Company (Southwestern Bell), Teleport Communications Group (Teleport), and the Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company, and Pacific Northwest Bell Telephone Company (US West). Ad Hoc, API, BellSouth, and Locate filed replies. Some pleadings relating to the local exchange carrier (LEC) supplemental pleadings required by the *Strategic Pricing Order* address reconsideration questions rather than the more limited questions of that supplemental phase. We have considered such pleadings in this Order.

[4] Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, Phase I and Phase II, Part 1, FCC 85-70, released Feb. 19, 1985; Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, Phase I and Phase II, Part 1, FCC 85-70, released Mar. 8, 1985.

[5] *May 1985 Designation Order*, note 2, *supra*.

[6] *May 1985 Designation Order* at para. 15.

[7] Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, Phase II, Part 1, Memorandum Opinion and Order, Mimeo No. 2057, released Jan. 17, 1986.

[8] Annual 1985 Access Tariff Filings, Memorandum Opinion and Order, Mimeo No. 7401 (Com.Car.Bur. 1985) (*Annual 1985 Access Order*), at paras. 60-62.

[9] Annual 1985 Access Filings, Order on Review, FCC 86-379, released Sept. 2, 1986.

[10] Annual 1987 Access Tariff Filings, 2 FCC Rcd 280 (Com. Car. Bur. 1986).

[11] Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, Phase II, Part 1, Memorandum Opinion and Order, 2 FCC Rcd 3507 (Com.Car.Bur. 1987) (*Rejection Order*).

[12] The affected carriers did not seek review of that decision. Those particular rates are no longer in issue.

[13] Attachments to the *Strategic Pricing Order* list: (1) direct cases filed in this docket in 1985 dealing with strategic pricing, and the parties that filed responsive pleadings on this issue; (2) the pleadings in the annual 1987 access tariff proceeding that address strategic pricing; and (3) the relevant pleadings in the annual 1988 access tariff proceeding. Attachment A in the instant Order lists the direct cases and responsive pleadings filed in the further investigation ordered by the *Strategic Pricing Order*, and terminated in the *Final Order* released today.

[14] Annual 1988 Access Tariff Filings, 3 FCC Rcd 1282, 1298-99 (Com. Car. Bur. 1987).

[15] Annual 1989 Access Tariff Filings, 4 FCC Rcd 3638, 3692-94 (Com. Car. Bur. 1989) (*Annual 1989 Access Order*). The Bureau required Southwestern Bell and US West to modify rates to fall within the presumptive range of reasonableness.

[16] 4 FCC Rcd at 4800.

[17] *Id.* at 4802.

[18] *Id.* at 4802.

[19] *Id.* at 4803.

[20] *Id.* at 4805.

[21] Some petitioners argue that the Act's requirement of just and reasonable rates means that each and every (*i.e.*, subelement or individual service) rate must be shown to be just and reasonable on a cost allocation basis.

[22] BellSouth reiterates the argument made in its petition, that the range of reasonableness should be tailored to the cross-over ratio of each individual LEC. BellSouth Opposition at 9.

[23] Petitioners cite two Bureau Orders in support of a requirement of per-service allocation and regulation: the Bureau's 1986 *GTE Telenet Order*, and its 1987 *Rejection Order*. GTE Telenet Communications Corp. v. American Tel. & Tel. Co., File No. E-81-32, Mimeo No. 4755, released May 29, 1986 (Com.Car.Bur.), *vacated as a condition of settlement*, Mimeo No. 5670, released July 10, 1986, *reconsideration denied*, 1 FCC Rcd 367 (Com.Car.Bur.) 1986 (*GTE Telenet Order*). In the *GTE Telenet Order* the Bureau said that Section 201(b) of the Act requires that all rates be just and reasonable, including those of individual services within a service category. *GTE Telenet Order* at para. 17, n. 32.

The *Rejection Order* rejects as unreasonable the unsupported certain strategically priced HiCap and DDS rates. That Order, while it states that "the Part 69 rules do not require that particular services or subelements within the special access category be targeted to earn the [authorized rate of] return," also notes that each carrier has "statutory obligations to refrain from establishing a charge for any service that would be 'unjust and unreasonable,' and to refrain from establishing relative charges for different services that would create undue preferences among classes of customers." 2 FCC Rcd at 3508. In finding the suspended strategically priced rates unlawful, the Order speaks of "a significant and often substantial 'premium' over a cost-based rate." *Id.*

[24] CompTel argues that LEC per-service rates must be required to cover costs; otherwise, CompTel states, the LECs are free to underprice, thereby killing competition. CompTel Petition at 1.

[25] The LECs contest these comparisons as inapt. *E.g.*, BellSouth Opposition at 11.

[26] Ameritech also notes that the petitioners' proposed cost allocation methods fail to account for opportunity costs, a significant factor in the determination of just and reasonable rates. Ameritech Opposition at 7.

[27] *See* FERC v. Pennzoil Producing, 439 U.S. 508 (1979); Farmers Union Central Exchange v. FERC, 734 F.2d 1486 (D.C. Cir. 1984).

[28] *See* note 25, *supra*.

[29] 4 FCC Rcd at 4803.

[30] Ad Hoc Petition at 10-11. Ad Hoc does note the apparent effectiveness of the hierarchy guideline in guarding against predatory pricing. *Id.* at 11.

[31] *See Strategic Pricing Order*, 4 FCC Rcd at 4801.

[32] Letter, dated Dec. 28, 1989, from Director, Tariff and Regulatory Matters, NECA, to Secretary, FCC.

[33] Several petitioners argue strongly that the *Strategic Pricing Order* fails to recognize the unique potential and characteristics of HiCap service, and that conclusions and methodologies based on the assumption that HiCap is a replacement for VG are simply wrong. *See, e.g.*, API Petition at 4-10; Ad Hoc Petition at 20-23.

[34] Further, petitioners dispute observations in the *Order* regarding stranded investment. Petitioners state that neither the arguments offered nor the *Order* itself projects the scope of the adverse rate impact attributable to stranded investment, explains whether such displacement occurs on a geographically distributed or concentrated basis, or ascertains the LECs' network design parameters for utilization of excess capacity (the network fill factor). These data are requested under guideline 3, petitioners acknowledge, but this requirement can be eliminated by a LEC's staying within the broad "range of reasonableness" established in the *Order*.

[35] *Strategic Pricing Order*, 4 FCC Rcd at 4802.

[36] API suggests that the Order is unclear whether the rate structure is to be found reasonable because it suppresses migration, or because it does not suppress migration. API Petition at 20.

[37] IDCMA states that any rate which falls outside the range of reasonableness because of its departure from costs will send distorted price signals to users and equipment manufacturers, and is thus virtually guaranteed to result in an inefficient allocation of network resources. Similarly, IDCMA urges, most efforts by the LECs to limit demand for particular subelements are likely to impede the development of new technologies, such as advanced multiplexing devices. IDCMA Petition at 19.

[38] Ameritech Supplemental Direct Case at 14.

[39] BellSouth Direct Case at 14. NYNEX argues similarly, and shows "robust growth" in HiCap services. NYNEX Direct Case at 23-26 and Exhibit 5.

[40] Discussion in this section is drawn from pleadings in the companion proceeding, as well as from reconsideration pleadings. *See* Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, Phase II, Part 1, FCC 89-331, released Jan. _____, 1990.

[41] These petitioners argue that if cost allocation methods are good enough to establish an economic cross-over range of reasonableness, those methods are reliable enough to use in per-service rate regulation. *See, e.g.*, API Petition at 12-15; IDCMA Petition at 5-9; Locate Petition at 5-11.

[42] *See, e.g.*, Ad Hoc Petition at 20-21.

[43] BellSouth developed a 16:1 cross-over ratio, and defends all its rates as falling within 30 percent above or below that point. BellSouth Direct Case at 5-6. BellSouth asserts in its direct case, as it does in its petition for reconsideration, that this crossover point is accurate, is supported by data, and is reasonable. *Id.* at 6. BellSouth says the *Strategic Pricing Order* attempted to define a reasonable range around costs, and says that this objective is achieved whenever the crossover point of strategically priced rates is 30 percent above or below the crossover point of the cost-based rates. *Id.* at 5 (citing *Strategic Pricing Order*, 4 FCC Rcd at 4805). In a written *ex parte* presentation, AT&T presented a similar analysis, arguing that multiplexing costs should be included in calculating the crossover ratio, which, AT&T asserts, would result in a crossover ratio of approximately 10:1. *See* Letter from Robert H. Castellano, Division Manager, Federal Regulation, AT&T to Secretary, FCC (Jan. 19, 1989). A major reason for the difference between our 6:1 ratio and the ratios suggested by other parties is their inclusion of types of costs that are not part of our crossover analysis.

[44] *See, e.g.*, Ad Hoc Petition at 20-22; API Petition at 15.

[45] *See* Ad Hoc Petition at 12-13. Ad Hoc argues that the rates rejected as unreasonable in the Bureau's *Rejection Order* would be presumed acceptable under the "range of reasonableness". *Id.* at 13.

[46] The commenters that have previously argued for inclusion of multiplexing costs in cross-over ratio calculations state that virtually all of the supplemental direct cases present cross-over ratios that are outside the range of reasonableness, when this factor is included.

[47] Ad Hoc Petition at 10-11. Ad Hoc does note the apparent effectiveness of the second guideline in guarding against predatory pricing by the LECs. *Id.* at 11.

[48] Petitioners also assert that this Commission has not sufficiently explained the particularity with which LECs will be required to demonstrate that their strategically set rates are in the public interest. *See, e.g.*, IDCMA Petition at 18-20.

[49] Ad Hoc Petition at 13-14; API Petition at 17-18.

[50] CompTel Petition at 1. The LECs state in opposition that viable competition does exist and will not be harmed by strategic pricing, and that the existence of this competition warrants the easing of regulation. Ameritech Opposition at 10-17.

[51] API agrees. API Reply at 6.

[52] Obviously, if, in the future, changed circumstances should demonstrate that this crossover range no longer approximates the cost relationship between these services, we would adjust the crossover range accordingly.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 85-166
Phase II, Part 1

In the Matter of

Investigation of Special Access
Tariffs of Local Exchange Carriers

MEMORANDUM OPINION AND ORDER

Adopted: November 28, 1989; Released: January 19, 1990

By the Commission:

I. INTRODUCTION

1. The history of this proceeding is described in the companion Order on Reconsideration that we adopt today in this docket.[1] In brief, the *Strategic Pricing Order* [2] adopted guidelines for determining the lawfulness of certain High Capacity (HiCap) and Digital Data Service (DDS) rates that were effective during the April 1985-March 1989 period, but did not make a final determination of the lawfulness of the particular rates under investigation. The Commission directed the affected carriers, which are listed in Attachment A to this Order, to file supplemental direct cases addressing the lawfulness of their rates under the guidelines described in the *Strategic Pricing Order* and invited other interested persons to respond to those direct cases.

2. The six guidelines the Commission established in the *Strategic Pricing Order* were designed to ensure that the strategically priced rates under investigation in this docket were just and reasonable. [3] *Strategic Pricing Order*, 4 FCC Rcd at 4803.[4] Our review of the pleadings in this proceeding reveals that most parties attack or defend strategic pricing methodologies rather than the specific rates before us. Based on our review of the supplemental direct cases, we conclude that some local exchange carriers (LECs) have failed to meet their burden of demonstrating compliance with our strategic pricing guidelines.[5] Accordingly, we find certain of the strategically priced special access rates under investigation to be unlawful and order refunds.

II. APPLICATION OF GUIDELINES

3. Throughout the course of this proceeding, the LECs' basic argument has been that strategic pricing of HiCap (or DS1) service, which provides a user with capacity equivalent to 24 voice-grade special access lines, encourages more efficient use of the network in several ways. First, LECs have advocated strategic pricing as a response to the problem of uneconomic bypass.[6] Second, LECs have argued that they need to use strategic pricing to manage the rate of migration from voice grade (VG) to HiCap services, in part to avoid stranded investment, but mostly to maximize efficient use of the network.[7] Third, LECs have stated that strategic pricing serves to minimize rate churn and replacement of facilities, thus reducing shortfalls in the recovery of non-recurring costs.[8] The LECs claim that they have accordingly priced their HiCap services within a range that will discourage network inefficiency by customers who might shift from use of switched services or voice grade lines if HiCap were priced at cost, but will not encourage complete facility bypass by customers who would obtain the facilities from competing vendors.[9]

4. The opponents of strategic pricing, interexchange carriers and user groups, have argued throughout this proceeding that the LECs' strategic ratemaking method results in wide ranges among charges even in contiguous states, and in rates that are far above costs.[10] They have contended that strategic pricing is prohibited by the Communications Act's requirement of just and reasonable rates and the Act's prohibition of preferential or discriminatory treatment, as well as by the Commission's access charge orders, as affirmed by the courts.[11] Opponents of strategic pricing have asserted, further, that strategic pricing will encourage, not deter, bypass.[12] Opponents of strategic pricing have also alleged that its use impedes technological development and customer choice. Finally, both user groups and interexchange carriers have challenged the LECs' assertions of viable competition in the HiCap market, and have asserted that rate regulation is needed.

5. Commenters here argue that no LEC has justified its rates based on the guidelines established in the *Strategic Pricing Order*. Those commenters assert that LECs make only generalized assertions that do not meet the requirements set forth in that Order.[13] Several opposition pleadings argue that all current and historical LEC rates are unjustified, and that this Commission should immediately find these rates unlawful and order refunds. *Id.*[14] We will consider the showings made in response to each of the five applicable guidelines.[15]

A. *First Guideline: Rates. Category Cost Allocation and Rate of Return as Benchmark*

6. The first guideline requires compliance with the cost allocation and rate of return requirements for the special access category established in this Commission's Part 65 and Part 69 Rules, 47 C.F.R. Parts 65, 69. 4 FCC Rcd at 4803. We apply this guideline not only to evaluate a carrier's rates and cost support at the time it files proposed tariff modifications, but also in evaluating "actual earnings on the special access category during the period that the rates under investigation were in effect . . . ." 4 FCC Rcd at 4804.

7. Attached to this Order as Attachment B is a chart showing the special access earnings reported by the LECs for the periods under investigation.[16] Under Part 65 of our Rules, 47 C.F.R. Part 65,[17] the authorized rate of return for the period October 1985 through December 1986 was 12.75 percent. During this period, the maximum allowable rate of return for any access service category, including the special access category, was 13.25 percent and the maximum allowable rate of return on overall interstate earnings was 13.10 percent. For the period January 1987 through December 1988, the overall authorized rate of return was 12 percent. The maximum allowable rate of return for special access was 12.40

percent and the maximum allowable rate of return on overall interstate was 12.25 percent.[18] We have applied these rate of return requirements[19] to the special access earnings reported by the LECs on their Form 492's which they file pursuant to our rules.[20] We find that five carriers exceeded their maximum allowable rate of return on special access in the first rate of return enforcement period under investigation in this docket. In addition, 10 carriers exceeded their maximum allowable rate of return in the second period. These carriers have therefore violated the first guideline. The amounts by which these carriers exceeded the maximum allowable rate of return in each of these periods are listed in Columns E and F of Attachment B.

8. Most of the LECs assert that they have no, or negligible, overearnings for the periods in question. In support, some carriers argue that the Commission should ignore overearnings in particular study areas and instead assess a company's overearnings at the holding or operating company level. BellSouth, for example, presents data asserting that "the strategic pricing of BellSouth's High Capacity services has not produced excessive revenue in the special access category" because its special access earnings aggregated to the holding company level were 9.35 percent for the 1985-1986 period and 10.07 percent for 1987. BellSouth Direct Case at 7. We note, however, that BellSouth overearned in individual study areas during the period when it tariffed special access by study area (*e.g.*, South Central Bell in Alabama earned 13.90 percent in the earlier period). *See* Attachment B. Under our rules, earnings are measured separately for each study area unless the carrier files access tariffs which aggregate costs or rates for more than one study area. *See* 65.702(c). Consistent with this rule, BellSouth reported earnings in its Form 492's by study area during the 1985-1986 time period. Therefore, the appropriate level of aggregation for BellSouth's earnings is by study area for this period and it is that reported level of aggregation which we will use to calculate BellSouth's overearnings.

9. Ameritech also provides information which it claims demonstrates that it has complied with our cost allocation and rate of return rules. *See* Ameritech Supplemental Direct Case at 3-5. Ameritech asserts that "the Ameritech Operating Companies never *actually* exceeded the authorized rate of return either for all interstate services or for that segment of services designated as special access" (*id.* at 4-5, emphasis in original). Ameritech also concedes, however, that its rate of return "came in higher than expected" for some study areas (*id.*). In fact, both Ameritech's supplemental direct case and its earnings report to the Commission clearly establish that two Ameritech companies overearned for the later period under investigation here. *See* Attachment B.

10. Some LECs question the extent to which these special access category overearnings are a result of strategic pricing. Both Rochester and US West, for example, explain their overearnings in the category as due only in small part to strategically set rates, and then only because of higher-than-expected HiCap demand. Both list additional factors contributing to special access category overearning. Rochester Direct Case at 6-8; US West Direct Case at 17-19. While some LECs argue that no refunds can be ordered absent clear proof that their strategic pricing caused or contributed to their overearnings,[21] we reject such an evidentiary requirement. Carriers are required both by our rules and, if they choose to price strategically, by the guidelines to earn no more than their allowable return for the category. Since strategic pricing could never justify overearnings at the special access category level, it can hardly prevent the imposition of a refund obligation for overearning on the special access category as a whole.

11. The carriers whose special access earnings exceeded the allowable rate of return for the period of this investigation have failed the first guideline.[22] Even when weighed against compliance with our remaining guidelines, as discussed below, we find generally that these failures to meet the first guideline cause certain of the rates set for investigation in this docket to be unjust and unreasonable.[23] These LECs are required to refund to their customers for strategically priced HiCap services the minimum amount that effectively would either: result in non-strategic HiCap rates for the periods in question, *i.e.*, rates at the high end of the presumptive range of reasonableness that approximates the cost crossover ratio with their VG rates, or bring the LECs into compliance with the first guideline by eliminating special access category overearnings.[24] Carriers with HiCap rates that fall into the former category also shall distribute to DDS users that portion of the remaining overearnings which represents a pro rata distribution to DDS of the amounts listed in Columns E and F of Attachment B, which display the total overearnings of each carrier.[25] Under the discretion granted the Commission in fashioning refunds in Section 204(a) investigations, in which the carriers bear the burden of proving their charges just and reasonable, we conclude that this amount best represents those DDS charges that are not justified and therefore subject to refund.[26]

12. We direct LECs required to make refunds under this guideline to file with the Commission within 40 days of the release of this Order a report describing in detail their efforts to effectuate these refunds. Specifically, the report must identify the total amount of the refunds, the recipients of refunds, the method of payment, their effort to determine who will receive refunds, and how they allocated the refund among potential recipients. We assume that carriers will rely primarily upon actual billings. Pending final disbursement of the refund, those carriers also must establish within 40 days of the release of this Order interest-bearing escrow accounts at a recognized financial institution, place the total refund amounts in those accounts, and provide the Chief of the Common Carrier Bureau with a letter describing those accounts and identifying the escrow agent exercising sole control over the account. We also direct these LECs to make the required refunds to their customers within 80 days of the release of this Order. Finally, we delegate to the Common Carrier Bureau the authority to oversee this process.

B. *Second Guideline: Hierarchy*

13. The second guideline established in the *Strategic Pricing Order* provides for pricing "hierarchy" requirements. The Commission stated that "the rates for less costly services cannot be higher than those for more costly services." 4 FCC Rcd at 4803. The LECs have generally asserted that their rates conform to a rough hierarchy as is required by the *Order*, showing that higher-cost services bear higher rates.[27] Some commenters challenge these assertions as either inadequately supported or simply wrong. Ad Hoc asserts that the LECs often have failed to show any consistency between hierarchies of

rates and underlying costs for certain strategically priced rates, have acknowledged but inadequately supported a lack of such consistency for other rates, or have ignored this guideline entirely. Ad Hoc Opposition at 67-71.[28]

14. We conclude that all the LECs whose rates are under investigation have adequately demonstrated that their special access rate structures conform to this guideline or have adequately explained any departures. Ameritech, for example, presents 25 pages of data showing unequivocally that its HiCap and DDS rates comply with our required hierarchical structure.[29] We agree with Ameritech's conclusion that "in no instance was [an Ameritech] service, whose FDC allocations were higher than another substitutable service, priced lower than its alternative."[30] BellSouth provides uncontroverted data showing "that for the substitutable voice grade and High Capacity offerings, higher rates are associated with the services having higher costs." BellSouth Direct Case at 9; *see id.*, Exhibit 3.[31] We also accept Bell Atlantic's demonstration that its "pricing structure ensures that customers of lower cost services always pay less than customers of higher cost services."[32] Cincinnati Bell shows that its rates were based on its specific unit investments, so that HiCap was the most costly and therefore highest priced service, followed by DDS, then voice grade. Cincinnati Bell states that this hierarchy has been maintained at all times.[33] Likewise, Southwestern, US West, and Rochester demonstrate that their strategically set rates conform to the hierarchy of costs for these services.[34] To the extent that some carriers departed from the hierarchy guideline in certain minor respects, their explanations for doing so are adequate[35] so that, when weighed against compliance with the other guidelines, we conclude that such departures do not compel a finding that the rates are unreasonable.[36]

C. *Third Guideline: Public Interest*

15. Our third strategic pricing guideline requires that the LEC must demonstrate that its strategic pricing practices further "a specific public interest . . . ." 4 FCC Rcd at 4803. A number of commenters object that the LECs have relied on the management of migration and the minimizing of uneconomic bypass as public interest objectives only by repeating the generalized statements made in the *Strategic Pricing Order*, and that the LECs have failed to support these statements with any facts or data. Commenters argue that both migration and uneconomic bypass have been stated by the Commission to be of decreasing importance in our strategic pricing policy deliberations. Commenters argue that the LECs have failed to demonstrate not only these two suggested policy objectives, but any benefit whatsoever accruing from the use of strategic pricing.[37] ICA notes the absence of any showing of reduced access costs or improved use of the network. ICA Comments at 8-15. AT&T contends that, on the public interest showings made here, it is impossible to conclude that any strategically priced rates were or are reasonable. AT&T Comments at 8-9.

16. The Commission stated in the *Strategic Pricing Order* that most LECs had made adequate public interest demonstrations in the pleadings already filed in this docket. 4 FCC Rcd at 4804. We now conclude that all the carriers whose HiCap and DDS rates are under investigation in this docket have met their burden of demonstrating that the public interest has been served by their use of strategic pricing.

1. *Uneconomic Bypass*

17. Pleadings filed in response to the supplemental direct cases claim that uneconomic bypass is no justification for strategic pricing. Although several LECs filed direct cases noting this justification, opponents argue that none offers the kind of "substantial support" the *Strategic Pricing Order* requires. Ad Hoc, for example, asserts that no LEC has demonstrated the need to use strategic pricing to decrease uneconomic bypass, although five LECs have relied on deterrence of bypass in their justifications. Ad Hoc Opposition at 47-56.[38]

18. ICA argues that the LECs have failed to support their reliance on deterrence of bypass to justify strategic pricing. ICA compares the reports filed by the LECs in CC Docket No. 87-339[39] with their direct cases here. The Docket 87-339 reports are generalized, ICA states, but indicate a basic inconsistency in LECs' arguments: in Docket 87-339 the LECs argue that HiCap is bypassed (due to high prices) at a loss to them; here, they argue that LECs can control bypass by overpricing HiCap. ICA Opposition at 7-8. In either case, ICA argues, the LECs have not provided supporting data, but only make the same assertions they have made previously. *Id.* at 8. Oppositions note that bypass figures are about the same with or without strategically priced HiCap rates, thus obviating uneconomic bypass as a justification for strategic pricing. MCI Opposition at 5, 7-8.[40] These bypass arguments fail to provide justification for past or current strategic pricing, they argue, let alone prospective strategic pricing. *E.g.*, AT&T Opposition at 8-9, 15.

19. MCI argues that whatever bypass has occurred has been economic, not uneconomic, bypass, and should not be obstructed by Commission policies. Further, according to MCI, strategic pricing has arguably exacerbated, not ameliorated, uneconomic bypass by artificially lowering rates for special access voice grade services and thus derogating from switched access. Third, MCI argues, WATS access lines have been economically priced since June 1986, thus undercutting bypass threats as a justification for strategic pricing. Opponents generally note the dissolution of the National Exchange Carrier Association (NECA) pool, and the substantial decreases in CCL charges, as factors negating the threat of uneconomic bypass of the switched system.

20. The Commission already determined in the *Strategic Pricing Order* that deterring uneconomic bypass was a legitimate public interest objective that could justify strategic pricing during the period under investigation. We find that the supplemental direct cases do demonstrate that the high capacity rates under investigation furthered that purpose during the relevant period. When switched access rates included high CCL rates to recover a portion of local exchange costs, the result was an incentive for large users to bypass the switched network by using special access services. HiCap services are particularly suitable for customers who have the greatest incentive to bypass switched services, and the LECs had good cause to believe that HiCap services would be used for that purpose during the relevant period.

21. During the relevant period, strategic pricing has been an effective and justifiable mechanism for mitigating uneconomic service bypass.[41] We agree with BellSouth that these strategic pricing practices "established a logical continuum of prices between access services which recog-

nized not only the cross-elasticities within categories of service such as voice grade and high capacity, but between categories such as switched and special."[42]

2. ***Migration***

22. Most of the LECs cite the control of migration as a public interest objective,[43] relying on the Commission's conclusion in the *Strategic Pricing Order* that this goal may justify the use of strategic pricing. *Strategic Pricing Order*, 4 FCC Rcd at 4804.[44] That Order noted that stranded investment could be an undesirable result of uncontrolled migration. 4 FCC Rcd at 4804. Ameritech makes a significant showing quantifying the stranded investment that results from HiCap-to-VG migration. Ameritech Direct Case at 6-8 and Attachment 3.[45]

23. Commenters assert that the LECs' direct cases do not demonstrate or support their alleged reliance on the need to manage HiCap-to-VG migration as justification for strategic pricing.[46] Commenters allege that the LECs have shown only that HiCap has grown and VG has decreased, but have established neither a causal relationship, an absence of other factors explaining these trends, nor any reason to believe it is necessary to arrange for the "management" (especially by the LECs) of the alleged migration.[47]

24. Further, they argue, the LECs have not shown that such objectives, even if they are found to be valid, are effectively served by strategic pricing;[48] trend and "migration" figures are roughly the same, they argue, regardless of whether rates were strategically priced.[49] ICA and Ad Hoc contend that LECs have failed to show any adverse effect from the various forms of migration, and therefore have failed to show any need to manage it.[50]

25. Several LECs have made extensive showings with regard to the manner in which strategic pricing has managed migration from voice grade to HiCap service.[51] Ameritech has met its burden under this guideline by demonstrating that it has used strategic pricing "to manage the migration of customer usage from analog voice grade services to digital services so that there is no dramatic, unnecessary and inefficient increase in digital construction, abruptly leaving usable investment idle."[52] Bell Atlantic demonstrates its furthering of the same public interest, and notes that by properly managing migration between services, it avoids burdening other services with the costs of displaced investment.[53]

26. Other carriers describe essentially similar strategic objectives in different terms. Rochester, for example, seeks to maximize the efficient use of the network, and to permit orderly processing of service requests and efficient network planning.[54] Cincinnati Bell demonstrates that its limited strategic pricing not only slowed the pace of migration but also served the public interest by contributing to the more efficient use of the network.[55] SNET states that its primary public interest objective is to provide special access services at reasonable rates.[56]

27. As the Commission noted in the *Strategic Pricing Order* and we reaffirm in the *Reconsideration Order*, the circumstances existing during the period under investigation generally made demand migration a legitimate public interest objective. We note in particular that, due to the AT&T divestiture and the implementation of our access charge plan, the regulatory environment was highly uncertain at the time the rates under investigation were filed. *See Reconsideration Order*, at paras. 48-50. We now conclude, based on the record before us, that the carriers advancing this public interest objective have adequately demonstrated that the specific rates under investigation satisfy this guideline.[57]

D. ***Fourth Guideline: Customer Choice***

28. The fourth guideline requires that strategic pricing "cannot unreasonably hinder a customer's choice of access service, the development or implementation of new technologies, and the efficient use of the network." 4 FCC Rcd at 4803. The LECs argue that the growth of HiCap demand proves that strategic pricing has not hindered customer choice. *See, e.g.*, BellSouth Direct Case at 14. They also assert that strategic pricing has not impeded customer choice in leaving VG services. Commenters assert that the mere fact of growth of demand for HiCap service does not prove that strategic pricing has not hindered customer choice. *See, e.g.*, Arinc Opposition at 10-11. Several commenters argue that HiCap growth is stimulated by non-cost considerations (technical and otherwise), and that overpricing of HiCap has impeded customer selection. API contends that, by pricing VG unreasonably low, LECs have impeded customer selection of switched services, thereby exacerbating any existing bypass problems. API Opposition at 2-4, 13.

29. We conclude that BellSouth is correct in asserting that "[i]f strategic pricing had in fact erected any significant impediment to the exercise of customer choice, this hindrance would be reflected in a static pattern of High Capacity demand and increasing growth in voice grade demand."[58] We are persuaded, too, by Bell Atlantic's assertion that its strategic pricing has not hindered customer choice, slowed the development or implementation of new technologies, or led to inefficient use of the network. Bell Atlantic supports this assertion with a description of growth, new technologies, and network efficiency.[59] Further, Bell Atlantic notes, its DS1 prices were established with reference to the cost of competitive alternatives, to ensure that those prices provide reasonable economic signals to the marketplace.[60] We also find persuasive Nevada Bell's statement that its rates do not unreasonably hinder customer choice, technological innovation, or efficient network use, and that this is borne out by the wide variety of customer choices among its access services.[61] In short, no opposing party has presented any creditable evidence to dissuade us from concluding that the LECs have met their burden in showing, primarily through demand comparisons, "that customer choice during the relevant period has been effectively preserved by the LECs' strategically priced rates.

E. ***Fifth Guideline: Unrestricted Availability***

30. The fifth guideline requires that strategically set rates "must be integrated into the special access rate structure with no restrictions on customers or uses." 4 FCC Rcd at 4803. We are satisfied that the LECs' strategic pricing practices during the rate periods under investigation in this docket have not compromised in any way the policies the Commission described in the *Volume Discount Practices Order*.[62] The Commission has been steadfast in ensuring that the special access rate structures established by the LECs be free of any restrictions against resale, shared use, and interconnection. We conclude that the LECs' strategic pricing practices have not introduced or perpetuated any such restrictions.

31. Our examination of BellSouth's direct case and tariff, for example, leads us to accept its assertion that "[t]here are no restrictions contained in the tariff or in BellSouth practices which would inhibit resale, sharing or interconnection of High Capacity services."[63] To cite a further example, Ameritech has amply demonstrated that its strategically priced HiCap rates conform to our volume discount requirements.[64] Other LECs have made similarly persuasive showings.[65]

III. CONCLUSION AND ORDERING CLAUSES

32. Following careful analysis of the supplemental direct cases and the pleadings relating to them, we are satisfied that the LECs' practice of "strategically pricing" the special access rates under investigation in CC Docket No. 85-166 was for the most part justified and reasonable during the relevant period. We have determined, however, that Diamond State, South Central Bell (Alabama), Southwestern Bell (Missouri and Oklahoma), Northwestern Bell (Iowa, Minnesota, Nebraska, and North Dakota), and Pacific Northwest Bell (Idaho) overearned during the period of October 1985 to December 1986. We have also determined that Ohio Bell, Wisconsin Bell, Southern Bell (North Carolina, South Carolina), South Central Bell (Mississippi and Tennessee), Pacific Bell, Nevada Bell, Southwestern Bell, Mountain Bell, Northwestern Bell, and Cincinnati Bell overearned during the period of January 1987 to December 1988. These carriers are therefore subject to refund obligations as discussed above.

33. On the basis of the current record, we conclude this investigation of special access rates.

34. Accordingly, WE FIND that the strategically priced special access rates of Diamond State, South Central Bell (Alabama), Southwestern Bell (Missouri and Oklahoma), Northwestern Bell (Iowa, Minnesota, Nebraska, and North Dakota), and Pacific Northwest Bell (Idaho), ARE UNLAWFUL for the period October 1985 through December 1986.

35. WE FURTHER FIND that the strategically priced special access rates of Ohio Bell, Wisconsin Bell, Southern Bell (North Carolina, South Carolina), South Central Bell (Mississippi and Tennessee), Pacific Bell, Nevada Bell, Southwestern Bell, Mountain Bell, Northwestern Bell, and Cincinnati Bell, ARE UNLAWFUL for the period January 1987 through December 1988.

36. IT IS ORDERED that the carriers named in paragraph 32 herein SHALL MAKE REFUNDS to their special access customers pursuant to the requirements of paragraphs 11 and 12, *supra*.

37. IT IS FURTHER ORDERED, pursuant to Section 4(j) of the Communications Act of 1934, 47 U.S.C. § 154(j), that the above-named carriers shall deposit the refund amounts due, plus interest already accrued, in interest bearing escrow accounts pursuant to the requirements of paragraph 12, *supra*, and shall provide to this Commission in accordance with the requirements of that paragraph written confirmation that such funds have been placed in such accounts. The simple interest accruing from October 1985 or from January 1987, as appropriate, to the date of deposit in escrow, using the current Internal Revenue Service rate, shall be added to the refund amounts calculated by the carriers. The same Internal Revenue Service rate shall then be used to compute simple interest from the date of deposit in escrow to the date refunds are finally paid. The cost of administering these accounts shall be borne by the carriers so charged.

38. IT IS FURTHER ORDERED that this investigation IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Attachment A

Carriers whose rates became effective subject investigation in CC Docket No. 85-166, Phase II, Part 1:

The Ameritech Operating Companies
The Bell Atlantic Telephone Companies
The BellSouth Telephone Companies
Cincinnati Bell Telephone Company
Nevada Bell
The NYNEX Telephone Companies
Pacific Bell
Rochester Telephone Company
Southern New England Telephone Company
Southwestern Bell Telephone Company
The US West Operating Companies

ATTACHMENT B

SPECIAL ACCESS OVEREARNINGS
(TIER 1 COMPANIES)

	TARIFF ENTITY	STUDY AREA	(A) SPECIAL ACCESS ROR 10/1/85 THRU 12/31/86	(B) SPECIAL ACCESS ROR 1/1/87 THRU 12/31/88	(C) SPECIAL ACCESS ANI ($000) 10/1/85 THRU 12/31/86	(D) SPECIAL ACCESS ANI ($000) 1/1/87 THRU 12/31/88	(E) SPECIAL ACCESS OVEREARNINGS ($000) 10/1/85 THRU 12/31/86	(F) SPECIAL ACCESS OVEREARNINGS ($000) 1/1/87 THRU 12/31/88	COSA
1	AMERITECH								AMTR
2	1. ILLINOIS BELL	ILLINOIS	10.87	7.03	$213,516	$236,170			LBIL
3	2. INDIANA BELL	INDIANA	12.86	8.36	$57,183	$67,397			NBIN
4	3. MICHIGAN BELL	MICHIGAN	12.61	6.03	$100,361	$132,694			MBMI
5	4. OHIO BELL	OHIO	13.09	13.27	$117,384	$119,471		$3,325	OBOH
6	5. WISCONSIN BELL	WISCONSIN	10.36	14.00	$58,998	$58,639		$3,001	WTWI
7	BELL ATLANTIC			11.81		$749,370			BATR
8	1. CHESAPEAKE & POTOMAC		10.54		$256,644				CPTC
9	1.1 C & P (D.C.)	DIST. OF COL.							CDOC
10	1.2 C & P of MARYLAND	MARYLAND							CMD
11	1.3 C & P of VIRGINIA	VIRGINIA							CVA
12	1.4 C & P of WEST VIRGINIA	WEST VIRGINIA							CWV
13	2. DIAMOND STATE TEL.	DELAWARE	15.65		$13,389		$744		DSDE
14	3. BELL OF PENNSYLVANIA	PENNSYLVANIA	9.37		$167,836				PAPA
15	4. NEW JERSEY BELL	NEW JERSEY	12.53		$182,606				NJNJ
16	BELL SOUTH								BSTR
17	1. SOUTHERN BELL								SBTC
18		FLORIDA	5.87	9.14 *	$159,628	$168,541			SBFL
19		GEORGIA	9.38	9.42 *	$145,352	$184,649			SBGA
20		NORTH CAROLINA	13.25	12.90 *	$58,725	$83,049		$1,328	SBNC
21		SOUTH CAROLINA	10.01	13.03 *	$38,373	$51,826		$1,044	SBSC
22	2. SOUTH CENTRAL BELL								SCTC
23		ALABAMA	13.90	10.15 *	$51,226	$59,485	$771		SCAL
24		KENTUCKY	11.78	10.72 *	$30,697	$35,430			SCKY
25		LOUISIANA	7.10	9.33 *	$64,322	$67,932			SCLA
26		MISSISSIPPI	8.98	14.03 *	$33,831	$34,417		$1,794	SCMS
27		TENNESSEE	11.34	12.68 *	$71,537	$77,494		$694	SCTN

ATTACHMENT B

SPECIAL ACCESS OVEREARNINGS
(TIER 1 COMPANIES)

	TARIFF ENTITY	STUDY AREA	(A) SPECIAL ACCESS ROR 10/1/85 THRU 12/31/86	(B) SPECIAL ACCESS ROR 1/1/87 THRU 12/31/88	(C) SPECIAL ACCESS ANI ($000) 10/1/85 THRU 12/31/86	(D) SPECIAL ACCESS ANI ($000) 1/1/87 THRU 12/31/88	(E) SPECIAL ACCESS OVEREARNINGS ($000) 10/1/85 THRU 12/31/86	(F) SPECIAL ACCESS OVEREARNINGS ($000) 1/1/87 THRU 12/31/88	COSA
28	NYNEX								NXTR
29	1. NEW ENGLAND TELEPHONE		8.27	9.75	$216,916	$234,779			NETC
30		MAINE							NEME
31		MASSACHUSETTS							NEMA
32		NEW HAMPSHIRE							NENH
33		RHODE ISLAND							NERI
34		VERMONT							NEVT
35	2. NEW YORK TELEPHONE	NEW YORK	5.58	10.32	$531,684	$571,575			NYNY
36	PACIFIC								PTTR
37	1. PACIFIC BELL	CALIFORNIA	13.22	13.37	$453,414	$396,506		$12,302	PTCA
38	2. NEVADA BELL	NEVADA		15.60		$9,389		$961	PTNV
39	SOUTHWESTERN BELL TEL. CO.			12.76		$638,982		$7,358	SWTR
40		ARKANSAS	8.19		$45,889				SWAR
41		KANSAS	11.40		$46,867				SWKS
42		MISSOURI	15.43		$139,100		$7,019		SWMO
43		OKLAHOMA	15.99		$62,684		$3,976		SWOK
44		TEXAS	12.42		$413,899				SWTX
45	U.S. WEST								USTR
46	1. MOUNTAIN BELL			14.22		$255,002		$14,845	MSTC
47		ARIZONA	4.63		$48,983				MSAZ
48		COLORADO	11.05		$80,674				MSCO
49		IDAHO	6.22		$11,725				MSID
50		MONTANA	6.65		$12,204				MSMT
51		NEW MEXICO	11.19		$25,264				MSNM
52		UTAH	9.46		$27,639				MSUT
53		WYOMING	8.06		$13,847				MSWY
54	2. NORTHWESTERN BELL			14.71		$175,073		$12,936	NWTC
55		IOWA	14.31		$40,559		$995		NWIA
56		MINNESOTA	13.85		$78,718		$1,093		NWMN
57		NEBRASKA	13.63		$25,543		$225		NWNE
58		NORTH DAKOTA	16.01		$8,823		$564		NWND
59		SOUTH DAKOTA	9.21		$11,461				NWSD

ATTACHMENT B

SPECIAL ACCESS OVEREARNINGS
(TIER 1 COMPANIES)

	TARIFF ENTITY	STUDY AREA	(A) SPECIAL ACCESS ROR 10/1/85 THRU 12/31/86	(B) SPECIAL ACCESS ROR 1/1/87 THRU 12/31/88	(C) SPECIAL ACCESS ANI ($000) 10/1/85 THRU 12/31/86	(D) SPECIAL ACCESS ANI ($000) 1/1/87 THRU 12/31/88	(E) SPECIAL ACCESS OVEREARNINGS ($000) 10/1/85 THRU 12/31/86	(F) SPECIAL ACCESS OVEREARNINGS ($000) 1/1/87 THRU 12/31/88	COSA
60	3. PACIFIC NORTHWEST BELL			9.41		$95,402			PNTC
61		IDAHO	15.09		$848		$36		PNID
62		OREGON	8.79		$30,689				PNOR
63		WASHINGTON	13.01		$59,503				PNWA
67	CINCINNATI BELL TELEPHONE	OH & KY	9.10	13.38 **	$24,353	$27,243		$854	CBTC
112	ROCHESTER TELEPHONE CORPORATION	NEW YORK	13.19	12.40	$12,638	$16,497			RTNY
113	SOUTHERN NEW ENGLAND TELEPHONE	CONNECTICUT	6.58	12.24	$66,992	$77,067			SNCT
							$15,423	$60,443	TOTAL

SOURCES AND EXPLANATIONS:

Only companies subject to the designation order are listed on this Chart.

Column (A): Source is final version of Form 492 due September 30, 1987 for the enforcement period 10/1/85 thru 12/31/86, Col C - Cumulative, row 8.

Column (B): Source is final version of Form 492 due September 30, 1989 for the enforcement period 1/1/87 thru 12/31/88, Col C - Cumulative, row 8.

Column (C): Same Form 492 as column (A), Col C - Cumulative, row 4.

Column (D): Same Form 492 as column (B), Col C - Cumulative, row 4.

Column (E): If Col (A) is greater than 13.25, ((Col (A) - 13.25)/100) * Col (C) * 1.851852 * (15/12), otherwise blank (overearnings are normalized for the 15 month period).

Column (F): If Col (B) is greater than 12.4, ((Col (B) - 12.4)/100) * Col (D) * ((1.515152 * 0.75) + (1.851852 * 0.25)) * 2, otherwise blank (overearnings are normalized for the two year period).

Columns (E) and (F) use the following tax factors:

(1) For 10/1/85 thru 12/31/86, the tax factor 1.851852 is applied to the entire period.

(2) For 1/1/87 thru 12/31/88, an average tax factor is used because the tax factor 1.851852 is applicable through 6/30/87 and the tax factor 1.515152 is applicable from 7/1/87 to 12/31/88. Comparable annual or semiannual data is not verifiable. Therefore, two year blended rate is used for the second enforcement period.

* BSTR: ROR for 1/1/87 through 12/31/88 reflects Commission ordered disallowances for PSV, CAT4B2, and CAT7E.

** CBTC: 13.38 reflects ROR after CC Docket 88-1 disallowances (on appeal)

FOOTNOTES

[1] Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, Phase II, Part 1, Order on Reconsideration, FCC 89-330, adopted Nov. 28, 1989 (*Strategic Pricing Reconsideration).*

[2] Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, Phase II, Part 1, Memorandum Opinion and Order, 4 FCC Rcd 4797 (1988) (*Strategic Pricing Order).*

[3] The guidelines, briefly, are as follows:

1. Carriers cannot deviate from the cost allocation and rate of return requirements of Part 69 and Part 65.

2. Hierarchies of rates and costs must be consistent.

3. Strategic pricing must further a specific public interest.

4. Strategically priced rates cannot unreasonably hinder a customer's choice of access service, the development or implementation of new technologies, or the efficient use of the network.

5. Strategically set rates must be integrated into the rate structure with no restrictions, in compliance with our volume discount policies.

6. Strategically priced rates require *de novo* justification in each annual access tariff filing.

Strategic Pricing Order, 4 FCC Rcd at 4803.

[4] Paragraphs 57 and 58 of the *Order* establish the requirement of a *de novo* showing for any proposed rate that is strategically set, and outline the six guidelines to be met by such a showing (and to be used in analyzing the suspended rates). Paragraphs 61-67 emphasize the standard of support to be met by such showings, and give examples of the data required to meet each guideline. *See* 4 FCC Rcd at 4803-04.

[5] *See Strategic Pricing Order*, 4 FCC Rcd at 4803 ("Carriers who propose strategic rates have the burden of demonstrating that their rates are consistent with those guidelines.").

[6] Because the Part 69 Rules assign a substantial part of local non-traffic sensitive (NTS) plant to be recovered from the per-minute Carrier Common Line (CCL) rates for switched access, large users may elect to use special access, even when the services are largely substitutable and the price advantage does not reflect any cost advantage. (Special access users typically pay a flat rate per month, while switched access users pay a charge per minute. Thus, as a switched user's minutes of use increase past the point at which it generates total per minute charges equal to the monthly special access charges, the user has an incentive to elect special access.) Higher switched access charges thus encourage uneconomic bypass of switched access services; *i.e.*, customers choose special access rather than switched access due solely to price differences that do not reflect the "real" underlying cost differences.

[7] For many LECs, managing this intra-category service migration appears to be the primary objective of their strategic pricing, which they accomplish by setting HiCap rates at a particular cross-over point in relation to substitutable voice grade services. NYNEX, for example, claims that if HiCap services were priced at actual cost, every customer with six or more voice grade circuits would switch to HiCap. According to the LECs, such migration would reduce network efficiency and result in higher rates for the general ratepayer.

[8] Rates to recover non-recurring costs (NRCs) were traditionally set below the actual non-recurring costs of providing and terminating service. The Commission recently concluded in this docket, however, that full-cost NRC rates are reasonable, and that carriers should use transitional measures to approach full cost recovery. Investigation of Interstate Access Tariff Non-Recurring Charges, CC Docket No. 85-166, Phase I, Part 3, 2 FCC Rcd 3498 (1987).

[9] The form of bypass described in note 6, *supra*, is called "service bypass." "Facilities bypass" occurs when a customer replaces LEC facilities entirely and obtains facilities provided by another vendor, or provides the facilities itself.

[10] The access rules reflect the basic differences between the individual service elements used for switched access, and the various features and services which comprise special access. The access rules establish the switched access rate elements, and require carriers to target the rates for each to earn no more than the authorized rate of return. For special access, however, the rules require that carriers target subelement rates to recover no more than the authorized rate of return for the category as a whole. The rules do not require carriers to target individual special access subelements to earn any specific rate of return. Section 69.113(d) of the Rules requires that "[c]harges for individual subelements shall be designed to reflect cost differences among subelements in a manner that complies with applicable Commission rules or decisions." 47 C.F.R. § 69.113(d). We have interpreted that provision to mean that rates for a more costly service or subelement may not be lower than rates for a less costly service or subelement. *Strategic Pricing Order*, 4 FCC Rcd at 4803; *Strategic Pricing Reconsideration*, paras. 35-37.

[11] *See Strategic Pricing Order*, 4 FCC Rcd at 4799-4800.

[12] Strategic pricing cannot combat bypass, these opponents argue, because HiCap facilities are being used not for service bypass but for the economical provisioning of special access. Furthermore, increasing HiCap rates to deter service bypass will only encourage total bypass of the local network as customers contract for or construct private bypass facilities.

[13] *See* Ad Hoc Opposition at 8; Arinc Opposition at 2-3, 5-6; API Opposition at 13; ICA Opposition at 3-4 (citing *Strategic Pricing Order*, 4 FCC Rcd at 4804).

[14] *See, e.g.*, Ad Hoc Opposition at 13-18; API Opposition at 4-6, 13; MCI Opposition at 5.

[15] The sixth guideline requires a *de novo* showing in support of each future rate that is strategically set, and does not apply to the rates that are the subject of this Order.

[16] The data for this chart are drawn from the LECs' rate of return reports, filed quarterly with this Commission.

[17] We initiated and have conducted this investigation pursuant to our authority under Section 204(a) of the Communications Act, 47 U.S.C. § 204(a). In the context of a Section 204(a) investigation, the decision whether to require refunds -- and in what amounts -- is committed to the sound discretion of this Commission. *See, e.g.*, American Television Relay, Inc., 67 FCC2d 703, 704, 705-07 (1978), *aff'd sub nom.* Las Cruces TV Cable v. FCC, 645 F.2d 1041 (D.C.Cir. 1981).

[18] *See* 47 C.F.R. § 65.701 *and* Authorized Rates of Return for Interstate Services of AT&T Communications and Exchange Telephone Carriers, CC Docket No. 84-800, Phase I, FCC 85-527, Sept. 30, 1985, paras. 4, 21.

[19] Our calculation of refund liability using a maximum allowable rate of return above the overall prescribed rate of return is consistent with our traditional policy concerning rate of return prescriptions and their enforcement. *See* American Telephone and Telegraph Co., 86 FCC 2d 221, 250 (1981).

[20] *See* 47 C.F.R. § 65.600.

[21] SWB notes that "[e]xcess earnings are . . . relevant in determining the reasonableness of strategically priced rates [only] if there is evidence of a direct correlation between the strategically priced rates and excess earnings." SWB Supplemental Direct Case at 6 n.10.

[22] For purposes of determining overearnings and refund liabilities, the rates of return include the "buffer" zones. In other words, only carriers that earned in excess of 13.25 percent for the special access category in the first period and in excess of 12.40 percent in the second period are subject to the refund requirement.

[23] The General Telephone Operating Companies filed, in lieu of a direct case, a statement asserting that the companies were not strategically pricing their special access rates. No party challenged this assertion and we accordingly do not extend our refund requirement to GTOCs. This result does not, of course, prejudice any party's right to file a complaint under Section 208 of the Act based on the GTOCs' overearnings in the special access category.

[24] Thus, those LECs are required to refund the lesser of (1) their special access category overearnings; or (2) the difference between the rates they actually charged for HiCap services, and the HiCap rates that would establish a 8:1 ratio with their VG rates for the periods in question.

[25] In order to calculate this amount, the carriers must first determine the pro rata share of overearnings attributable to each special access subelement on the basis of total billings for the relevant rate of return enforcement period.

[26] Carriers submitting the filings ordered here whose special access overearnings are also the subject of pending complaints under Section 208 of the Act should ensure that their submissions here accord with their data submissions in those proceedings.

[27] *See, e.g.*, Ameritech Supplemental Direct Case, Attachment 2; Bell Atlantic Supplemental Direct Case, Attachment B and Exhibits 2, 3, and 4.

[28] Ad Hoc states that NYNEX and Pacific fail to show consistency for some of their rates. According to Ad Hoc, NYNEX fails to maintain the cost/rate hierarchy even between low- and high-speed DDS options. Ad Hoc also alleges that Pacific discloses several instances of inconsistency, including cases where HiCap service, which costs less than DDS service, is priced above it.

Ad Hoc argues that NYT and NET acknowledge but fail to support departures from hierarchical consistency in certain instances. NYT shows a misalignment between VG and DDS costs and rates, according to Ad Hoc, and limits its data to 1987 and 1988. Ad Hoc claims that NET shows HiCap at a lower cost than DDS, but priced higher.

Finally, Ad Hoc contends that SWB, Bell Atlantic, BellSouth, and US West ignore this guideline or fail to provide data pertinent to evaluation under this guideline.

[29] Ameritech Supplemental Direct Case, Attachment 2.

[30] *Id.* at 5-6.

[31] BellSouth also asserts that, for the 1985-1986 period, BellSouth "used existing NECA rate relationships to allocate special access revenue requirements to subelements." *Id.* at 8. BellSouth argues that the Commission has accepted this ratemaking methodology, that the cost and rate hierarchy established through use of the NECA rate relationships is not a focus of the investigation in this docket, and that the Commission "is without discretion to enter a retroactive determination of invalidity, fully three years after the fact." *Id.* at 8-9. BellSouth's characterization of the nature and scope of our discretion is wholly without merit. The fact that these rates became effective does not somehow exempt them from our investigation. All of the relevant special access rates have taken effect subject to investigation, and the guidelines the Commission adopted in the *Strategic Pricing Order* do not conflict with any prior determination of the Commission. Nonetheless, we find that, taken as a whole, BellSouth's showing with regard to its hierarchical rate structure is adequate.

[32] Bell Atlantic Supplemental Direct Case, Attachment B and Exhibits 2, 3, and 4.

[33] Cincinnati Bell Supplemental Direct Case at 8-9 and Exhibit F.

[34] SWB Supplemental Direct Case at 7-8 (and Attachment B, explaining the derivation and use of unit revenue requirements, or URRs); US West Supplemental Direct Case at 19-22 and Exhibits 3A, 3B, 4A, and 4B (US West used an allocation methodology that allowed less costly services to be priced at a lower rate than more costly services); Rochester Supplemental Direct Case at 9-10 and Exhibit III.

[35] *See, e.g.*, Nevada Bell Direct Case at 8-10 and Exhibit 1, 1-4. Nevada Bell explains the single aberration in its rates as resulting from its use of older vintage, speed-specific office channel units, and states that this anomaly will disappear as the older units are retired and replaced with newer, all-speed units. *Id.* at 9. NYNEX explains its compliance generally with the hierarchy guideline, and notes that any minor deviations from the hierarchy have not resulted in the sending of false signals to customers or the market. NYNEX Direct Case at 7-10 and Exhibit 2. *See also* Pacific Bell Supplemental Direct Case at 8-9 and Appendix B (in all cases VG is less costly to provide than HiCap and has been price accordingly; deviations from the hierarchy were solely among DDS options or between DDS and HiCap); SNET Supplemental Direct Case at 5 (deviations only between VG and DDS).

[36] For example, a relevant, but by no means determinative, factor in our analysis is the fact that NYNEX reported unusually low earnings for the special access category in both rate of return enforcement periods. As Attachment A indicates, NET reported returns of 8.27 percent and 9.75 percent during the two periods in question; NYT reported returns of 5.58 percent and 10.32 percent.

[37] *See, e.g.*, Ad Hoc Opposition at 6-8, 13-14; Arinc Opposition at 7-11; API Opposition at 10-11.

[38] Ad Hoc says that NYNEX, SWB, US West, BellSouth, and Nevada have relied on deterrence of bypass, but that none has demonstrated the need to use strategic pricing. These LECs incorrectly term HiCap a "primary bypass facility," Ad Hoc says, and offer no data regarding the amount or percentage of facilities being used uneconomically to bypass the system. Ad Hoc Opposition at 47-56.

[39] CC Docket No. 87-339, Establishment of a Program to Monitor the Impact of Joint Board Decisions. *See Monitoring Report and Order*, 2 FCC Rcd 5266 (1987); *Monitoring Reconsideration Order*, CC Docket No. 87-339, FCC 88-244, released July 19, 1988.

[40] MCI argues that a carrier customer would use switched access, or WATS or VG special access, before it would turn to HiCap. MCI Opposition at 7. Further, MCI asserts, strategic pricing exacerbates bypass problems by pricing VG below cost. *Id.* Finally, any reliance on decreasing bypass as a justification for pricing strategically disappeared with the decision to price WATS access lines economically (June 1986), and any arguments based on application of separations rules or practices have disappeared since the modification of the separations rules, MCI contends. *Id.* at 7-8. MCI attaches to its opposition a study of

facility and service bypass, which MCI says demonstrates clearly that BOC bypass estimates have been significantly inflated. *Id.* at 20 and Attachment A.

[41] *See, e.g.*, US West Direct Case at 22-26. *See also* SWB Supplemental Direct Case at 8-12. SWB notes that "[a]s the spread between switched access charges and DS1 rates increases, the switched access usage level at which a DS1 service becomes a viable alternative (*i.e.*, the cross-over usage level) increases. As the cross-over usage level increases, fewer end users are likely to engage in service bypass." *Id.* at 11. *But see* para. 40 of our companion reconsideration order in this docket in which we find that our policies to reduce the potential for uneconomic bypass mean that uneconomic bypass will no longer provide a sufficient justification for future strategic pricing.

[42] BellSouth Direct Case at 10. We agree with BellSouth that the extent to which strategic pricing was successful in complementing our policies aimed at deterring uneconomic bypass cannot be precisely quantified. *See id.* BellSouth notes that it has begun taking steps to expand its collection of data regarding HiCap services so that these types of effects can be measured more effectively in the future. *Id.* at 12.

[43] *See* BellSouth Direct Case at 9-10; Rochester Direct Case at 10; Bell Atlantic Direct Case, Attachment C and Exhibit 5; NYNEX Direct Case at 15-17; Cincinnati Direct Case at 9-10; Ameritech Direct Case at 6-7; Nevada Bell Direct Case at 10-11.

[44] Two LECs, Rochester and US West, state that strategic pricing has no apparent effect on migration from VG to HiCap services. Rochester Direct Case at 10; US West Direct Case at 27-28.

[45] While three other LECs claim that such stranded investment exists, they do not quantify any loss.

[46] *See, e.g.*, Ad Hoc Opposition at 19-20, 40-46; Arinc Opposition at 7-9; API Opposition at 10-13; AT&T Opposition at 8-9, 15.

[47] *See, e.g.*, Ad Hoc Opposition at 19-20.

[48] AT&T asserts that a review of the LECs' tariff review plans (TRPs) reveals that strategic pricing has not affected migration or decreased stranded investment. AT&T Opposition at 13-25.

[49] *See, e.g.*, MCI Opposition at 15-17; Ad Hoc Opposition at 40-46.

[50] Ad Hoc Opposition at 19-20; ICA Opposition at 13-15. MCI argues that even Ameritech's "worst case scenario" -- which a number of commenters challenge as theoretical and unrealistic -- shows only an insignificant loss, and thus fails to show negative impact. MCI Opposition at 11-12.

[51] *See, e.g.*, Nevada Bell Direct Case at 10-13. Nevada Bell also asserts that its use of strategic pricing has furthered the important public policy of recovering costs from the cost causer. *Id.* at 13-17. NYNEX too makes a persuasive showing that its strategically priced rates have indeed served the dual public interests of avoiding uneconomic bypass and managing migration. NYNEX Direct Case at 10-17 and Exhibits 3 and 4. NYNEX's rate calculations, which "were the product of informed judgment," *id.* at 11, are accepted here in light of the circumstances extant at the time of their formulation.

[52] Ameritech Supplemental Direct Case at 6-13.

[53] Bell Atlantic Supplemental Direct Case, Attachment C and Exhibit 5.

[54] Rochester Direct Case at 11.

[55] Cincinnati Bell Supplemental Direct Case at 3-5 and Exhibits A, B, and C.

[56] SNET Supplemental Direct Case at 5-6.

[57] *But see* para. 50 of our companion reconsideration order in this docket, in which we find that the circumstances that made management of VG-to-HiCap demand migration a reasonable justification for the strategic pricing of HiCap services in the past will not exist in the future, and that management of demand migration will not provide a justification for any further strategic pricing.

[58] BellSouth Direct Case at 14. NYNEX argues similarly, and shows "robust growth" in HiCap services. NYNEX Direct Case at 23-26 and Exhibit 5.

[59] Bell Atlantic Supplemental Direct Case, Attachment D and Exhibit 5.

[60] *Id.* at Attachment D at D-3, and Exhibit 6.

[61] Nevada Bell Direct Case at 18-19.

[62] Private Line Rate Structure and Volume Discount Practices, 97 FCC 2d 923 (1984) (*Volume Discount Practices Order*).

[63] BellSouth Direct Case at 15.

[64] Our review of Ameritech's pleadings and tariff has not given us any reason to question Ameritech's explanation that

> the rate structure for the discounted [HiCap] service is consistent [with] the rate structure elements of other special access services. It is available to all customers and there are no use restrictions. Its purchase is not bundled with any extraneous features and it does not require the use of any otherwise optional features.

Ameritech Supplemental Direct Case at 16.

[65] *See, e.g.*, Bell Atlantic Supplemental Direct Case at Attachment E; Cincinnati Bell Supplemental Direct Case at 11-12; Nevada Bell Direct Case at 19; NYNEX Direct Case at 26-28; Rochester Direct Case at 18; SNET Supplemental Direct Case at 6-7; SWB Supplemental Direct Case at 14-17; US West Direct Case at 28-31; Pacific Supplemental Direct Case at 13.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-421

In re Applications of

MID-OHIO/CAPITOL COMMUNICATIONS LIMITED PARTNERSHIP	File No. BPH-870515MK
SCIOTO BROADCASTERS, LIMITED PARTNERSHIP	File No. BPH-870514MU
MID-OHIO RADIO LIMITED	File No. BPH-870515NM
CLEAR CHANNEL COMMUNICATIONS, INC.	File No. BPH-870515NN
HORACE E. PERKINS	File No. BPH-870515NP

For Construction Permit for a New FM station on Channel 298A in Columbus, Ohio

Appearances

Stephen Diaz Gavin, J. Jeffrey Craven on behalf of Mid-Ohio/Capitol Communications Limited Partnership; *Lawrence Bernstein* on behalf of Mid-Ohio Radio Limited; *William E. Kennard* on behalf of Scioto Broadcasters Limited Partnership; *William K. Keane, Michael Drayer* on behalf of Clear Channel Communications, Inc.; *Robert B. Jacobi, Lawrence N. Cohn, Cheryl R. Glickfield* on behalf of Horace E. Perkins; and *Jerry M. Hermele* on behalf of Chief, Mass Media Bureau.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE EDWARD J. KUHLMANN

Issued: January 12, 1990; Released: January 24, 1990

1. Five applicants, out of twelve originally designated for a comparative hearing, are competing for a construction permit to operate a new Class A FM station at Columbus, Ohio. The applicants were designated for hearing on August 15, 1988. *Hearing Designation Order*, 3 FCC Rcd 5480 (1988). Various post-hearing filings and the following issues remain to be resolved in this decision:

1. To determine, with respect to Mid-Ohio:

(a) The basis for, and the validity of, the cost estimates projected by Mid-Ohio to build and to operate its proposed facilities without revenues for three months;

(b) Whether Mid-Ohio has sufficient net liquid assets on hand, or available from committed sources, to construct and operate its proposed facilities for three months without revenues;

(c) Whether, in light of the evidence adduced pursuant to the foregoing issues, Mid-Ohio is financially qualified;

(d) To determine, (i) whether, in light of the evidence adduced pursuant to issue (c) above, Mid-Ohio made misrepresentations to the Commission, was lacking in candor in its dealings with the Commission or attempted to deceive or mislead the Commission and (ii) if (i), above, is resolved in the affirmative, the effect thereof on Mid-Ohio's basic qualifications to be a Commission licensee.

2. To determine whether the proposal of the following applicants would provide coverage of the city sought to be served, as required by Section 73.315(a) of the Commission's Rules, and, if not, whether circumstances exist which warrant waiver of that Section: Mid-Ohio, Scioto, Radio, Communications, and Perkins.

3. If an environmental impact statement is issued with respect to Perkins, in which it is concluded that the proposed facilities are likely to have an adverse effect on the quality of the environment, to determine whether its proposal is consistent with the National Environmental Policy Act, as implemented by Sections 1.1301-1319 of the Commission's Rules.

4. To determine which of the proposals would, on a comparative basis, best serve the public interest.

5. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

2. The Bureau, in the *HDO*, found that data submitted, when there were 12 applicants, indicated there would be a significant difference in the size of the areas and populations which would receive service from the proposals. The Bureau directed that comparative consideration should be given to service which the applicants would provide within 1 mV/m or greater intensity, together with the availability of other primary aural services in primary signal areas. All of the remaining applicants in this proceeding have executed the Joint Stipulation Regarding Areas and Populations which provides that no party is entitled to a preference for its proposed coverage.

3. A prehearing conference was held on November 22, 1988. Tr. 1-22; *Order*, FCC 88M-3052, released September 19, 1988. Written testimony was exchanged on June 12, 1989 and hearing sessions to cross-examine witnesses on that testimony were held on June 26 (Tr. 23-231/349), June 27 (Tr. 350-589/624), June 28 (Tr. 625-875/924), June 29 (Tr. 925-1139/1224), June 30 (Tr. 1225-1354/1425), and July 5, 1989 (Tr.1426-1553). The record was closed on July 5, 1989. *Order*, FCC 89M-1858,

released July 12, 1989. Proposed findings and conclusions were filed by the applicants and the Bureau on October 4, 1989 and replies were filed on October 31, 1989.

POSTHEARING FILINGS

Radio's Motions to Disqualify Counsel for Perkins, Enlarge Issues Against Perkins and Clear Channel, and Reopen the Record

4. Radio moves to disqualify counsel for Perkins on the grounds that Perkins' law firm, Cohn & Marks, has a conflict of interest in representing Perkins because it ordinarily represents Clear Channel, another applicant in this proceeding. Clear Channel holds 20 broadcast and television licenses, 4 LPTV licenses or permits, and operates a radio news network. In all regulatory matters involving those licenses or applications for new licenses, Cohn & Marks has been and is counsel to Clear Channel. Radio claims that Cohn & Marks' interest in two applicants has resulted in Clear Channel and Perkins treating each other not as adversaries but with deference. Radio believes that this has been exhibited by Clear Channel's allegedly cursory examination of Perkins and its failure to depose him. Radio describes this behavior as collusive and believes that it has resulted in an abuse of the Commission's processes and subverted fairness in this proceeding.

5. Radio argues that Cohn & Marks is in a position to use or withhold confidential information which it has gained from Clear Channel and Perkins and that it can do so to the advantage or disadvantage of each of them. Radio urges that Cohn & Marks' conduct "offends" the ABA Code of Professional Responsibility Disciplinary Rule 4-101(B), which prohibits various actions regarding client confidences, and Rule 5-105, which prohibits multiple employment if it adversely affects counsel's judgment.

6. Perkins argues that the motion to disqualify is "egregiously" untimely and that Radio has no interest in the issue raised. Perkins, according to lawyers at Cohn & Marks, hired Cohn & Marks to represent him in this proceeding before Clear Channel approached the firm about representing it. Cohn & Marks told Clear Channel it would have to find other counsel and it told Perkins that, if the firm continued to represent him, it would not take any adverse position against Clear Channel's interest because the firm had represented Clear Channel and would continue to represent Clear Channel in all other regulatory matters. Perkins decided he wanted the firm to continue to represent him. Perkins believed Clear Channel such a weak applicant, it would not be necessary for Cohn & Marks to try to raise issues about Clear Channel's proposal. Perkins represents that he gave informed consent.

7. Perkins argues that, pursuant to the canons of ethics governing lawyers who practice in the District of Columbia, Cohn & Marks could represent Clear Channel and Perkins simultaneously if the firm's independent judgment will not be or is unlikely to be adversely affected. Cohn & Marks asserts that Perkins understands that the firm's independent judgment will be adversely affected in representing him because the firm cannot use any information it has about Clear Channel to Perkins' benefit or Clear Channel's disadvantage. Even though it cannot exercise independent judgment on Perkins' behalf, Cohn & Marks asserts that the canons of ethics permit the firm to act on the behalf of Perkins and Clear Channel if the clients understand the restraint on the firm's judgments and give their consent. In addition, Cohn & Marks argues that Radio would need to show an actual conflict to deprive Perkins of his counsel of choice. Although Perkins and Cohn & Marks argue the Commission cannot make that determination because of the risk of depriving Perkins of his representation, Joel Levi and Robert Jacobi, lawyers in the firm, urge that they could, and would withdraw as Perkins' lawyers, if in their judgment, an actual conflict arose.

8. Perkins argues that Radio's motion should be dismissed because it has no stake in the alleged conflict and the motion is untimely. Perkins asserts that "no substantive or procedural disadvantage" might be caused to Radio from the alleged conflict and, therefore, Radio's only reason for raising the issue is to seek an impermissible tactical advantage. Perkins also points out that Cohn & Marks has represented him in the proceeding for over two years during which time the substantive gathering and hearing of evidence has taken place. Perkins claims that Radio could have determined at the outset of the proceeding from public records of the Commission that Cohn & Marks represented Clear Channel. In addition, Perkins represents that Cohn & Marks told all counsel at a meeting on December 13, 1988 that the firm also represented Clear Channel. Perkins argues, moreover, that Cohn & Marks had no obligation to reveal to the Commission its simultaneous representation of Perkins and Clear Channel.

9. Radio petitions to enlarge issues against Perkins and Clear Channel to determine whether Perkins and Clear Channel were dishonest in not revealing their simultaneous representation by the same counsel. Radio also petitions to enlarge issues against Perkins to determine whether Clear Channel is a real-party-in-interest in Perkins' application. Radio concedes that the petition is late under the time requirements of §1.229 but it urges that its counsel has been busy preparing proposed findings and could not concentrate on issues regarding other applicants. Radio points out that in July it hired new counsel and that he was unfamiliar with the case. Whatever the merits of those arguments, Radio believes the issues it is raising should be designated because they are of decisional significance and present substantial public interest questions.

10. Radio argues that Perkins and Clear Channel withheld Cohn & Marks' representation of each of them and that Clear Channel failed to effectively examine Perkins on his proposal during the discovery and hearing phases of this proceeding. Radio points out that Clear Channel had the primary responsibility to examine Perkins' proposal under the procedures applicable to this case and it did not fulfill that obligation. Radio maintains that Cohn & Marks put itself in a position where it could not act ethically. The firm, Radio urges, was ethically bound to use its knowledge about Clear Channel to assist Perkins and, at the same time, the firm was ethically prohibited from revealing any information it had about Clear Channel to Perkins.

11. Radio also asserts that because Clear Channel is one of Cohn & Marks' major clients, it cannot be expected that the firm would decline to represent Clear Channel in favor of Perkins. This view leads Radio to assert that Perkins must be a front for Clear Channel's interests.

Radio also asserts that Perkins and Clear Channel's failure to reveal their representation by Cohn & Marks has been an abuse of the Commission's processes.

12. Perkins responds to Radio's petition by pointing out that while it had a responsibility under procedures adopted for this proceeding to examine Clear Channel, Robert Jacobi, a lawyer at Cohn & Marks, decided that the firm could not examine Clear Channel on Perkins' behalf. Mr. Jacobi states in a declaration that he "mention[ed] to other counsel in the proceeding that Cohn and Marks represents Clear Channel in other contexts." Declaration, dated September 26, 1989, at 4. He claims that he instructed Lauren Bloom, an associate in his firm, to inform all counsel at a meeting on December 13, 1988, that the firm would be unable to carry out its responsibility to examine Clear Channel at deposition and hearing because Cohn & Marks also represents Clear Channel. *Id.* Ms. Bloom states in a declaration that she told the other counsel about Cohn & Marks representing Clear Channel at the December 13, 1988 meeting.

13. Perkins argues that, if Radio were going to raise the representation issue, it should have done so following the December 13, 1988 meeting. Perkins maintains that the Commission must also have known about Cohn & Marks' representation of Clear Channel, since the firm has represented Clear Channel for nearly 20 years and "filed literally hundreds of documents with the Commission on its behalf." In any event, Perkins urges that Cohn & Marks was not required to inform the Commission about its dual representation under any Commission rule. Perkins asserts that the Legal Ethics Committee of the District of Columbia Bar has held that an attorney need not reveal to a "court" or opposing counsel "multiple representation." Perkins argues that Cohn & Marks' duty was only to its clients.

14. Perkins points out that if Clear Channel were a real party in interest in his application there would have been no reason for Clear Channel to have applied. Clear Channel, Perkins believes, would have been more likely discovered if it joined the proceeding. Perkins also notes that, while Radio urges that Clear Channel did not examine Perkins in earnest, it has not pointed to any questions that were not asked. Perkins claims that, if there had been other questions to have been asked, McCall, another applicant, could have asked those questions since it too had responsibility for examining Perkins. Finally, Perkins believes that the fact that he has rejected offers of settlement from Clear Channel signifies that Clear Channel has no interest in his proposal.

15. Clear Channel points out that Radio does not claim that Clear Channel has a conflict since only a party's counsel has an ethical obligation to avoid conflicts. Clear Channel also urges that as long as Cohn & Marks continued to make filings for Clear Channel, the Commission was adequately informed about the simultaneous representation of Perkins and Clear Channel by Cohn & Marks. Clear Channel, in any event, claims it aggressively attempted to determine if Perkins was qualified. It represents that it went so far as to investigate public records in Columbus to determine if any evidence existed that might have reflected on Perkins' qualifications. Clear Channel states that Radio has incorrectly argued that Clear Channel did not depose Perkins, since it did do so. In other respects Clear Channel makes the same arguments as Perkins.

16. Radio replies to the oppositions by claiming, but not reliably supporting the claim, that Perkins did not inform other counsel except Scioto's counsel. Radio observes that Clear Channel does not support Cohn & Marks in their claim that the firm informed the other parties that it represented both Perkins and Clear Channel. Radio points out that Perkins and Clear Channel do not refute that the presiding officer was not informed about Cohn & Marks' representation. Radio also believes that while Clear Channel investigated Perkins, it waited until it was too late to timely raise any issue that it might have found. Radio, in response to the argument that it had pointed to no relevant questions that were not asked of Perkins, now provides areas where Perkins should have been questioned. Radio does not, however, suggest any information that was not revealed that would influence the outcome of this proceeding. Radio argues, independently, that its showing on the issues it raises warrants reopening the record. Both Perkins and Clear Channel argue that Radio's claims are without merit.

DISCUSSION

17. Cohn & Marks admits that it represents Perkins in this proceeding and the applicant Clear Channel in all other Commission proceedings. The firm concedes that it had to make special arrangements in order to represent both parties and that those arrangements act as a restraint on its professional judgment. Cohn & Marks told Perkins that they could not tell him any information about Clear Channel that might be helpful to defeating Clear Channel's application. Perkins agreed to this because, in his view, it made no difference to his success. He believes that Clear Channel's comparative proposal is not competitive. His assessment is premised on Clear Channel's failure to promise operation of the station by owners and the fact that it already holds licenses for 20 broadcast stations. Thus, when Cohn & Marks stated to Perkins that it could not represent the interests of Perkins and Clear Channel, its longtime client, Perkins consented. Clear Channel also consented because Cohn & Marks promised to comply with DR 4-101(B) --not to reveal a confidence about Clear Channel, not to use a confidence to Clear Channel's disadvantage, and not to use a confidence about Clear Channel to the firm or Perkins' advantage-- and its agreement not to examine Clear Channel during discovery or at the hearing. Those concessions only work to Clear Channel's advantage. Cohn & Marks represents, in addition, that it would protect Perkins' interest if a matter about Clear Channel's qualifications came to its attention. The firm would then tell Perkins that there was a conflict. What would then result is not known since that apparently has not happened.

18. It appears that Cohn & Marks has complied with applicable Disciplinary Rules 4-101(B) and believes it has complied with 5-105(C). *See Dorothy J. Owens*, 60 Radio Reg. (P&F) 2d 1279, 1282 n. 3 (Review Bd. 1986). It is less clear whether Cohn & Marks has complied with Ethical Consideration 2 of Canon 9, which advises lawyers to act "in a manner that promotes public confidence in the integrity and efficiency of the legal system and the legal profession," and whether Cohn & Marks and Perkins had the interest of the public as its focus when they agreed to proceed. *See Comuni - Centre Broadcasting, Inc.* v. *FCC*, 856 F. 2d, 1551, 1555 (D.C. Cir. 1988). The integrity and efficiency of the legal system would not be

served if information came to Cohn & Marks' attention that Perkins should have been told. Cohn & Marks would then have to either violate the client confidence disciplinary rule or withhold information from Perkins. It might also have to ask Perkins to find a new lawyer at a time when it would work to his disadvantage. While there are hundreds of lawyers who specialize in the regulation of broadcast communications, that fact is only an argument for always being able to insure that the appearance of fairness is being achieved as well as fairness. Perkins believes that his proposal is so strong that almost anyone could have represented him and he would prevail.

19. One other ethical factor is presented by Cohn & Marks' action: The licensing process is not like a bipolar civil action in a district court; it is an administrative proceeding which has as its focus the interest of the public, not the private rights of the litigants. Cohn & Marks' method of protecting Clear Channel ignored Perkins' obligation and the firm's obligation to assist the Commission in arriving at the best choice for the Columbus facility. Perkins and Cohn & Marks essentially agreed not to review Clear Channel's proposal or take any steps to inform the Commission about Clear Channel. Decisions like that undermine the integrity of the process. Their decision, however, does not appear to have had any impact in this case. There were a number of other applicants who could review Clear Channel's proposal and Clear Channel actually does not have a comparative proposal of much merit. On the other hand, counsel for Perkins was most able and aggressive in pursuing the other applicants and had he pursued Clear Channel or Perkins' proposals, the record might be different.

20. It is not "obvious," as required by DR 5-105(C), that Cohn & Marks could adequately represent anyone in this proceeding but Clear Channel. And once the firm had begun to provide advice to Perkins, it could no longer adequately represent Clear Channel. Mr. Jacobi explains in his declaration that the firm had provided legal advice to Perkins from 1984 to April 17, 1987 before Clear Channel approached the firm. In addition, Perkins could hardly have given informed consent to Cohn & Marks' plan that it would not tell him anything it knew about Clear Channel that would be of help to him. Since Perkins did not know what the lawyers at Cohn & Marks knew, he could not have determined that it was not to his disadvantage to remain with Cohn & Marks. That restraint, Cohn & Marks partner, Joel Levy, represents, did not matter since the firm did not know anything about Clear Channel that would help Perkins. However, Levy's representation focuses on evidence that Perkins might have introduced in the hearing; Perkins also has been repeatedly approached by Clear Channel to agree to settle the case and there is every reason to believe that Cohn & Marks' knowledge about Clear Channel could be very helpful to Perkins' interest in a negotiated settlement of the proceeding. The Commission's rules specifically provide for settlements and Commission policy encourages settlement.

21. There is no merit to Radio's claim that Perkins or Clear Channel acted improperly. They were not bound to make an ethical assessment for their lawyers. There is no evidence that Perkins had information about Clear Channel that should have been brought to the attention of the Commission. Moreover, there is no evidence that Clear Channel failed to question Perkins on relevant information. Radio claims that Clear Channel did not depose Perkins, but it did. Radio's petition to enlarge issues against Clear Channel and Perkins will be denied. Radio's motion to disqualify Cohn & Marks comes too late in the proceeding to have any impact on the proceeding. The proposed findings and replies have been filed and all that remains is for this decision to be issued. If Radio believes that Cohn & Marks should be censored in some manner, it should file a complaint with the appropriate bar group or the Commission's general counsel. The presiding officer is concerned only with the issues to be decided and the qualifications of the parties in this hearing. The ethical decisions made by counsel, it may be found, affect those determinations if they are timely raised. However, when they are raised after the proceeding has been held, there is no need to take any action unless it can be shown that the record is incomplete or unreliable as a result of counsel's ethical decisions. Here, other parties filled in the record in the areas where counsel did not participate and there is no evidence that the record is inaccurate or incomplete. Radio's motion to disqualify counsel for Perkins will be denied.

Radio's Petition to Reopen Record to Receive Additional Testimony of Karen Murray

22. Radio petitions to reopen the record to receive additional testimony from its principal, Karen Murray. The ostensible purpose of the "new" testimony is to respond to "certain erroneous statements" made by the presiding officer in an order issued August 16, 1989. Ms. Murray wants to explain how new counsel was hired. While the whole filing is premised on the need to answer erroneous conclusions, Radio does not identify what erroneous conclusions were made. In the proffered testimony, Ms. Murray claims, inter alia, that the presiding officer "ordered Radio to get another attorney." There was no order directing Radio to obtain other counsel. Radio made that choice on its own for the reasons stated in *Memorandum Opinion and Order*, FCC 89M-2086, released August 16, 1989. Ms. Murray's new testimony is conclusory and self-serving; no public interest benefit would result by adding it to the record. In the August 16, 1989 order it was suggested that the decision that was made by Radio and its counsel about hiring a new lawyer may be relevant to the question of control if the record did not contain substantial evidence on this point; there appears to be evidence in the record that will adequately answer the question. There must come a time when the applicants can no longer add facts to the record.

23. Perkins and Scioto both oppose reopening the record. Scioto points out that when it wanted to explore the question Radio now wants to submit evidence on, Radio opposed the testimony. In fact, it was that request that was the subject of the aforementioned order. Scioto notes that Radio delayed making its request until after the proposed findings had been filed and six weeks after the order about which it complains was issued. Scioto also maintains that Ms. Murray's newly proposed testimony is self serving and contradicts her hearing testimony. Perkins submits some of the same arguments as Scioto. In addition, Perkins points out that Ms. Murray's rebuttal does not respond to the record, since the facts about how new counsel was hired are not in the record. The new information, Perkins urges, is not decisionally significant. Radio has failed to demonstrate that the method by which it hired new counsel is necessary and relevant evidence to assess its proposal. The facts about how it happened to

hire new counsel are already part of the record and they are not as Ms. Murray now claims. Radio's motion to reopen the record will be denied. The time to have requested additional testimony has long since passed.

FINDINGS OF FACT

Issue 1: The Mid-Ohio Financial Issue

24. All applicants in this proceeding were required to establish their financial qualifications and the Mass Media Bureau reviewed the showings. *HDO*, 3 FCC Rcd 5480 (1988). The Bureau stated in the HDO that it assumed each applicant would have legal expenses of $5,000 and a hearing fee of $6,000. *Id.* When an applicant had not provided for those expenses, they were added to the estimated costs. *Id.* In order to establish operation and construction costs for the Bureau's review, Mid-Ohio submitted 1984 estimates for Upper Arlington, Ohio, a suburb of Columbus. Because the estimates were two years old when Mid-Ohio applied in 1987, the Bureau questioned whether the estimates were still accurate and whether they related to the facilities that Mid-Ohio proposed. Therefore, Mid-Ohio was required in the *HDO* to establish the "basis for, and the validity of, the cost estimates," it projected.

25. The Bureau, after reviewing Mid-Ohio's Upper Arlington study, concluded that Mid-Ohio would need more than $662,183. That amount, the Bureau concluded, did not include money for acquiring land and installation of equipment. While Mid-Ohio represented that its projections included installation costs, the Bureau found that the estimate for equipment costs, without installation, made by the supplier were the same as Mid-Ohio's estimate with installation. The Bureau also found that Mid-Ohio's estimate of $351,000 in total costs neglected to provide for three months operating expenses which the Upper Arlington proposal listed as $376,183.

26. Mid-Ohio stated that it would finance its proposal with money from its general partner and four limited partners in proportion to their shares in the partnership. It also submitted a June 26, 1987 letter from AmeriTrust Bank, Cleveland, Ohio which provided that the bank had an interest in lending Mid-Ohio $350,000. However, because the Bureau found that the bank letter was obtained after the application was filed on May 15, 1987, it could not be considered in determining whether the applicant was financially qualified when it certified. Mid-Ohio would, therefore, the Bureau held, have to test its representation against the ability of the partners to finance the proposal. The Bureau found that, based on their shares of equity, the general partner had an obligation to provide $196,855 and each limited partner would need to provide $106,630. However, the Bureau found that the listed proportional interests of the partners equaled only 95% and there was no indicated source for 5% or $32,809 of the needed money.

27. None of the partners, the Bureau found, had supplied documentary support of their ability to provide the money for their share. The Bureau examined, in detail, the balance sheet of Joseph Hewitt, the general partner. The Bureau concluded that Mr. Hewitt had a negative liquid net worth and that he would be unable to meet his proportionate contribution. Mr. Hewitt claimed that the other partners would lend him money to meet his share, but the Bureau found that Mr. Hewitt did not provide any loan commitment statements. The Bureau designated an issue to determine whether Mid-Ohio had the necessary money to construct and operate. In light of Mid-Ohio's showing, the Bureau designated an issue to determine whether Mid-Ohio misrepresented or lacked candor in dealing with the Commission or attempted to deceive or mislead the Commission about its financial qualifications.

The Cost Estimates Used by Mid-Ohio in Certification

28. Joseph Hewitt claims that he made an error in originally establishing the costs of construction and operation for Mid-Ohio's proposal. Mid-Ohio Exh. 3, at 2. He states that his original estimate of $351,000 in costs, which included $230,000 in bank debt and $71,500 in equity, was in error. *Id.* Mr. Hewitt said that he misread the Upper Arlington estimates. He thought the suggested bank debt of $230,000 and the $230,000 listed for total equipment expenditures represented total construction costs. He also mistook the listing for total equity of $286,000 in the Upper Arlington proposal to be the total first year operating costs. *Id.*, at 2-3. He divided the $286,000 equity item by four and used that as his total three month operating costs. *Id.*, at 3. Those costs, which he then estimated to be $71,500, were added to $230,000 along with legal, engineering and other application costs to reach Mid-Ohio's estimate of $351,500. When Mr. Hewitt was shown the Upper Arlington proposal at the hearing and was asked to identify the correct first quarter estimated cost of operation in the proposal, he was able to do so. Tr. 169-70. And he also was able to identify the cash required, $513,398.50, from that document. Tr. 170. Mr. Hewitt conceded that, if the proper numbers were used, he would have needed at least $513,000. Tr. 480.

29. Before Mr. Hewitt certified, he had obtained a copy of the "General Instructions" to Form 301 and a copy of the March 19, 1987 *Public Notice*, "In the Matter of Certification of Financial Qualifications." Mid-Ohio Exh. 3, at 2. Mr. Hewitt said he did not adjust the two year old estimates for Upper Arlington to match Mid-Ohio's Columbus proposal. Tr. 137. He said that he did not know whether the equipment estimate included installation but he assumed that, if he were going to spend $163,000, the equipment seller would install it at that price. *Id.* He did not spend much time on the estimates. Tr. 138. He believes he gave the estimates to the other partners. *Id.*

The Source of Money to Meet the Estimated Need for Funds

30. Mr. Hewitt said that Mid-Ohio intended initially to rely on contributions from the partners to pay for the station. Tr. 88-89. Mr. Hewitt, in his testimony, said he was expected to provide 31% or $108,965 and that, if he could not provide the money, other partners would lend him the money. Mid-Ohio Exh. 3, at 4. While Mr. Payne told Mr. Hewitt he would cover any shortfall, no details were discussed. Tr. 158-59. The other partners were to provide 17.25% of capital needed, according to Mr. Hewitt. Mid-Ohio Exh. 3, at 4. Mr. Hewitt, when examined, said that the partners would need to provide about $60,000. Tr. 159. He stated that when he provided Mid-Ohio's financial proof to the Bureau, he estimated that he was to provide 30% of $351,500 or $105,450 to finance the proposal. Tr. 156. He received only verbal assurances from the limited partners that they would make their contributions. Tr. 90-91, 108-09, 111, 115, 123. He did not

look at their balance sheets. Tr. 170. When Mid-Ohio sought to justify the liquid net worth of the partners to the Bureau, it claimed that Mr. Hewitt had $39,600, Hubert B. Payne $180,000, Darrell A. Fields $42,950, Dominic L. Ozanne $125,000, and Val C. King $62,116. Mr. Hewitt claimed that he could rely on his $50,000 in holdings in limited partnerships, which he represented were liquid, although they are not publicly traded. Tr. 157-58. He knew at the outset that he did not have sufficient liquid assets; he relied on assurances from Mr. Payne that he would provide the rest needed. Tr. 158. However, there was no written agreement between them. Tr. 159.

31. Mr. Payne's estimated net liquid assets of $180,000 are based on a "put agreement" for 10% of his stock in Channel 19, Inc., licensee of WOIO-TV, Shaker Heights, Ohio. McCall Exh. 5. In addition, Mr. Payne represented that he had agreed to cover any shortfall Mr. Hewitt might have in other applications in which they are both partners. Tr. 364-65. Mr. Payne also agreed to cover Mr. King's shortfall, if any, in Mid-Ohio. Tr. 369-70.

32. Mr. Ozanne's financial commitment is supported by a line of credit to him in his capacity as President and 25% owner of Ozanne Construction Company, Inc. from AmeriTrust Bank. Tr. 490; McCall Exh. 5. There is no evidence that Mr. Ozanne may use the credit for his personal investments. Tr. 493. Mr. Ozanne also claims he could borrow the money from the construction company or his father. Tr. 491.

33. Mr. Fields' estimate of liquid assets of $42,950 is based on having access to a $40,000 certificate of deposit. The certificate is in his spouse's name but held by her father as trustee. Tr. 450-51 Mr. Fields represents that George Forbes, the trustee, who is also his father-in-law, has given oral assurance to him that he can use the CD to pay his commitment. Tr. 454.

34. Mr. King's $62,116 estimate of his liquid assets is based on his ability to obtain a home equity loan. The house is valued at $90,000. Mr. King has $17,000 in equity and there is a $73,000 mortgage. Mr. King also claims that he can mortgage the home of his spouse's parents. Tr. 386-87, 410-11. There is no written support for any of these representations. Tr. 388-89, 411.

35. Hewitt, Payne, Fields, Ozanne and King hold 15% limited partnership interests in applicants for new FM radio stations in Tucson, Arizona, Albuquerque, New Mexico, and Beaumont, Texas. McCall Exh. 4, at 4, 5, 6, 7, 8. They also have an 18% interest (except Mr. King, who has a 28% interest) in an applicant for Roswell, Georgia. *Id.* Mr. Ozanne is a 30% limited partner in an applicant for Huron, Ohio. *Id.*, at 7. Mr. Payne has a 37.5% interest in an application for Louisville, Kentucky. *Id.*, at 5. Mr. Payne and Mr. Fields hold a 37.5% interest in an applicant for Baton Rouge, Louisiana. Tr. 202-03. The Tucson and Albuquerque proposals were filed the same day as this one. McCall Exh. 4, Tr. 95, 111-13, 118-19, 127-28. Mr. Hewitt knew about these applications but he did not know whether the partners had committed funds to them. Tr. 91-94, 103-06, 111-14, 118, 127-30. He did not know what his own commitment to the Tucson and Albuquerque applications was. Tr. 95-99, 170-71. Hewitt, Payne, Fields, Ozanne, and King never sat down as a group and discussed how they would finance the three ventures with their personal assets. Tr. 215. When they filed each of the three applications, they did not have a bank letter. Tr. 378-79. Mr. Hewitt was aware of all the applications, with the possible exception of Baton Rouge, but he never attempted to determine whether he or the other partners had a commitment to the other applications. Tr. 95-99, 170-71, 103-06, 111-14, 118, 127-30.

36. Mr. Payne testified that he and Mr. Fields have a commitment of $25,000 each to the Baton Rouge application, above and beyond their obligation covered by bank financing. Tr. 472. He represented that each Mid-Ohio Partner has a commitment to Tucson of $75,000, to Albuquerque of $60,000, to Beaumont of $60,000, to Roswell of $75,000 (for those with an 18% interest), and to Louisville of $150,000. Tr. 215-20.

37. Mr. King did not know what his financial commitment was to the Tucson, Albuquerque and Beaumont applications. Tr. 390-92. His testimony differs with Mr. Payne's about the Roswell application. Mr. King holds a 28% interest in the applicant and he believes that $60,000 to $70,000 of his personal assets are committed to Roswell alone. Tr. 393. Mr. King also stated that in Roswell Hewitt, Payne, Fields, and Ozanne have proportionate commitments to the Roswell applicant. Tr. 393-99, 413.

38. Mr. Hewitt represented that his financial obligation to Columbus would be covered by Mr. Ozanne. Tr. 111. Mr. Ozanne testified that his commitment to the Tucson and Albuquerque applications is only an initial capitalization requirement (Tr. 498-500) and he is not obligated to loan money to Hewitt or anyone else in any of the group's projects. Tr. 504.

39. In 1989, Mr. Hewitt revised Mid-Ohio's cost estimates. Mid-Ohio Exh. 3, at 1-2; Exh. 3, Att. B. Mr. Hewitt now estimates that it would require $495,800 to construct and operate for three months without revenues. *Id.*

40. Mr. Hewitt undertook a new cost estimate for the Mid-Ohio proposal because of the Bureau's analysis in the *HDO*. Mid-Ohio Exh. 3, at 5. He also decided to obtain a "new basis" for money to meet the costs. *Id.* He claims that by February 1989 he completed a new business plan -- 6 months after the *HDO* pointed out Mid-Ohio's errors. *Id.* He sought the assistance of Ellis Beach, a colleague of Hubert Payne, and Stan Karos, a media director at an advertising agency and a former engineer at Channel 19, Cleveland, Ohio. Tr. 139-72. In addition, Mr. Hewitt obtained a letter, dated March 8, 1989, from CVC Capital Corporation committing $495,800 to Mid-Ohio. *Id.* The loan is contingent on Mid-Ohio demonstrating that it is "a small business concern which is controlled and managed by socially and economically disadvantaged individuals as defined by the SBA [Small Business Administration] Regulations." *Id.*, at Att. A, at 1. Mr. Hewitt does not know whether Mid-Ohio's partners meet these qualifications, and he never discussed the matter with Joerg G. Klebe, the President of CVC and the person who provided Mid-Ohio with CVC's assurance. Tr. 177-80. However, Mr. Hewitt stated that he told CVC that Mid-Ohio qualified as a small business concern as defined by the SBA. Tr. 177. Mr. Hewitt does not know how SBA defines a small business concern. Tr. 178-79. Mid-Ohio did not disclose the existence of the CVC letter until June 16, 1989, when it petitioned for leave to amend its financial showing.

41. Aside from the CVC letter, Mr. Hewitt said that he is personally liable for approximately $10,000 in litigation expenses to Mid-Ohio. Tr. 100-03. He has no reason to believe that his share of litigation expenses will not be the same in other proceedings. Tr. 103.

Issue 2: Whether the applicants comply with the city grade coverage rule, Section 73.315 (a), and, if not, whether a waiver is warranted

42. Two exhibits were submitted: a Joint Engineering Exhibit (Clear Channel Exh. 3) on behalf of Mid-Ohio, Scioto, and Perkins and a separate exhibit for Radio. Radio Exh. 5. Radio supplemented its exhibit with a statement by its engineer. Radio Exh. 5A. The Joint Exhibit points out that because Columbus has an irregular shape, a jagged boundary, uneven protrusions, and numerous holes, there is no location where a Class A FM facility could completely cover Columbus with the 70 dBu contour. Clear Channel Exh. 3, at 1. Perkins will cover 71.4% of Columbus, Mid-Ohio, Scioto, and Clear Channel will cover 73.4% of Columbus. *Id.*, at 2. They will cover approximately 86% of the population. *Id.* According to Radio's engineer, John J. Mullaney, the Commission was aware when the allocation was made to Columbus that a Class A facility in communities above 300,000 population could not cover the entire city with a 70 dBu signal. Radio Exh. 5, at 4. The north-south and east-west boundaries of Columbus are 32 kilometers apart; under normal circumstances a Class A facility cannot cover a city whose diameter exceeds 27.4 kilometers. *Id.* Radio will cover 74.1% of Columbus with its 70 dBu contour and about 86% of its population. *Id.*, at 3.

Issue 3: The environmental impact of Perkins' proposal

43. After the close of the record, the Chief, Audio Services Division, found that there will be no adverse environmental impact from Perkins' proposal if measures to protect humans from nonionizing radiation are carried out. The Bureau requested that a grant to Perkins be conditioned to achieve that protection. On August 15, 1989, Perkins accepted the condition imposed by the Bureau.

COMPARATIVE FACTORS

Integration of Ownership Into Management

Mid - Ohio

44. Mid-Ohio is an Ohio limited partnership with one general partner, Joseph C. Hewitt, who owns 30% of the equity. Mid-Ohio Exh. 1. There are four limited partners with 16.25% of the equity, Hubert B. Payne, Darrell A. Fields, Dominic L. Ozanne and Val C. King, and one limited partner with 5% of the equity, Thomas W. Roberts. Mid-Ohio Exh. 1; Mid-Ohio Exh. 4, Exh. A, at 231. Joseph Hewitt will move to Columbus from Cleveland, Ohio, and become the full-time general manager. Mid-Ohio Exh. 2, at 1, 3. Mr. Hewitt will have primary and ultimate responsibility for all decisions, supervise all management personnel, and generally oversee all aspects of the station. Mid-Ohio Exh. 2, at 1. Mr. Hewitt is an African American; he works at WKYC-TV, Cleveland. Mid-Ohio Exh. 2, at 2-3. Mr. Hewitt made a claim for broadcast experience which he did not substantiate.

Scioto

45. Scioto is a limited partnership with one general partner, Paul D. Warfield, who holds 25% of the equity. Scioto Exh. 1, at 1. There are three limited partners: Ernest Green, who holds 26% of the equity, Samuel Morgan, who holds 25% of the equity, and Ben Espy, who owns 24% of the equity. *Id.* Mr. Warfield proposes to work full time, 40 hours per week, during regular business hours, as the station's general manager. Scioto Exh. 2 at 2. He will be responsible for all aspects of the management and operation of the station. *Id.*

46. Mr. Warfield lived in Columbus from 1960 to June 1964 and from January 1965 to June 1965. *Id.*, at 3. From June 1987 through October 1988 he "maintained a part-time residence in Columbus." *Id.* He currently lives in Gahanna, Ohio, which is located within the service area of Scioto's proposed station. *Id.* He has lived there since November 1, 1988. *Id.* Mr. Warfield's permanent residence at the B cutoff date was Beachwood, Ohio, near Cleveland, over 100 miles from Columbus. Tr. 653-54. From June 1987 to October 1988, Mr. Warfield worked in Dayton, Ohio. Tr. 655. During that time he spent most daytime hours working in Dayton or commuting. Tr. 655-56.

47. Over the past 16 years, Mr. Warfield has been employed by one radio station and eight television stations and television networks in positions as (1) "part-time sportcaster and radio talk show host" (17 months); (2) "part-time sports anchor" (4 months); (3) "full-time assistant sports director" (2 years); (4) "analyst for NFL football" (8 months); (5) "analyst for college football" (4 months); (6) "analyst for Cleveland Browns football" (2 months); (7) "substitute analyst for NFL football" (1 game); (8) "part-time sports announcer" for NFL (3 months); (9) "part-time sports announcer" (high school football and NFL analysis) (6 months); (10) "part-time sports announcer" (1983 to present). Scioto Exh. 2, at 5-6.

48. Since September 1987, Mr. Warfield has been on the Board of Directors of the Mid-Ohio Food Bank, which serves the needy residents of Columbus and various counties in Central Ohio. Mid-Ohio Exh. 2, at 3; Tr. 666. In this connection, he attends 7 to 8 meetings per year, each of which last about 1-1/2 to 2 hours. Tr. 664-65. He also addressed one of the group's luncheons in November 1988, where he gave a presentation which lasted 30 minutes. Scioto Exh. 2, at 5; Tr. 674.

49. Since March 1988, Mr. Warfield has been on the Board of Directors of the Columbus Youth Corps, which promotes personal and scholastic achievement of Columbus youth. Exh. 2, at 3. He has attended a total of 2 or 3 meetings, each of which were about 2 hours in duration. Tr. 668.

50. Since April 1988, Mr. Warfield has been a member of the Columbus Chapter of the National Football League Alumni Association. Exh. 2, at 4. He is not a member of the Board of Directors. Tr. 670. His participation consisted of attending a one day golf outing. Tr. 669.

51. Mr. Warfield served on the selection committee for the Ohio State Alumni Association's Prestigious Alumni Citizen Awards in 1988, and he twice appeared as a speaker at its events. Scioto Exh. 2, at 4; Tr. 671. Mr. Warfield has been a member of the Ohio University Black Alumni Association since 1986. Scioto Exh. 2, at 4. He has not spent any time with this group. Tr. 671-72. He is not currently on the Board of Directors. Tr. 671. In December 1988, Mr. Warfield spent a "couple of hours" (Tr. 672), participating in the United Negro College Fund's fund raising telethon. Scioto Exh. 2, at 4. This entity raises funds to assist African American students

throughout the country. Tr. 672. In April 1989, Mr. Warfield narrated a tribute to Paul Robeson at the Martin Luther King Center in Columbus. Scioto Exh. 2, at 4.

52. In February 1989, Mr. Warfield participated in a fund raising event for the Heinzerling Foundation, which operates a residential treatment center for handicapped children in Columbus. Scioto Exh. 2, at 4. Mr. Warfield's participation in this event consisted of being a roaster for Michigan football coach Bo Schembeckler. Tr. 673. In March 1981, Mr. Warfield was a featured speaker for the Merry Makers, an organization which provides scholarship funds for minority students in Columbus. Scioto Exh. 2, at 4. In 1985, Mr. Warfield spoke at the "football appreciation banquet" for Watterson High School in Columbus. Scioto Exh. 2, at 5.

53. Since September 1988, Mr. Warfield's family has been a member of the Columbus Chapter of Jack and Jill, Inc., an organization which promotes educational and cultural development among black families and raises funds for similar organizations. Scioto Exh. 2, at 5. Mr. Warfield is not a member of Jack and Jill's Board of Directors and has devoted a total of 4 1/2 hours to this organization. Tr. 674- 75. Mr. Warfield has been a member of the Columbus Association for the Performing Arts since November 1988, but he has spent no time at all on its activities. Scioto Exh.2, at 5; Tr. 675. Mr. Warfield is an African American. Scioto Exh. 2, at 3.

Radio

54. Radio is an Ohio limited partnership. Radio Exh. 1. There is one general partner, Karen Murray, who holds a 15% partnership interest. *Id.*, Att. A, at 4. There are two limited partners, McFadden Communications Corporation (MCC), which holds an 80% partnership interest, and William Book Roth, who holds a 5% partnership interest. Radio Exh. 1, Att. A, at 4. McFadden Communication Corporation's chairman is Douglas McFadden and he owns about 55% of MCC's stock. Tr. 1432.

55. If Radio's application is granted, Ms. Murray plans to move from Germantown, Tennessee, to Columbus, Ohio to devote full- time, 40 hours per week, to the Columbus FM station. Radio Exh. 2, at 1; Tr. 684. She proposes to be the station's general manager. *Id.*[1]

56. Ms. Murray first learned of the frequency availability in Columbus from Mr. Roth, who is affiliated with MCC in another FCC application for an FM radio station in Fresno, California.[2] Tr. 701-04. McFadden, Evans & Sill, the law firm in which Douglas McFadden is a name partner, represented Radio in this proceeding through the hearing. Ms. Murray learned of Mr. McFadden through Mr. Roth. Tr. 703-05, 708. (Ms. Murray does not know how Messrs. Roth and McFadden became acquainted. Tr. 706.) Ms. Murray wrote Mr. McFadden a letter, dated March 7, 1987, seeking his involvement in the Columbus application. Tr. 708-09. In the letter Ms. Murray appealed to Mr. McFadden by stating that "I feel that Mr. Roth and I can create a successful radio station that would provide the service the Columbus residents need and desire." Scioto Exh. 4; Tr. 715. Before she wrote to Mr. McFadden, Ms. Murray asked Mr. Roth to contact him and see if he would be interested. Mr. Roth did that and told her to write to Mr. McFadden and to invite him to come to Columbus for a meeting. Tr. 708.

57. Mr. McFadden responded by letter dated March 11, 1987, on McFadden, Evans & Sill stationery. Scioto Exh. 5; Tr. 722. Despite the fact that Mr. McFadden had never inquired about or seen Ms. Murray's financial records, he stated that he was "impressed with the opportunity" and enclosed a limited partnership agreement for Ms. Murray to sign. Tr.723-25, 1510. The agreement had the name of the partnership and the equity percentages of 80% for MCC, 5% for Mr. Roth and 15% for Ms. Murray already filled in; Mr. McFadden had never discussed the ownership shares with Ms. Murray. Tr. 724-26. Ms. Murray signed the partnership agreement Mr. McFadden sent her without making any changes and without inquiring as to how the equity percentages were reached. Tr. 725, 732-33.

58. Ms. Murray and Messrs. Roth and McFadden met at the Columbus airport on March 14, 1987 to discuss the partnership. Tr. 727. Ms. Murray testified that she never actually spoke to Mr. McFadden until the March 14 meeting. Tr. 712. Mr. McFadden testified that he had several conversations with Ms. Murray prior to the meeting. Tr. 1509. Ms. Murray has never inquired about the organization of MCC and relied on Mr. Roth's verbal assurances that Mr. Roth and MCC could meet their financial obligations to the partnership. Tr. 728-32. Ms. Murray obtained Radio's initial bank letter from Bank Ohio. Scioto Exh. 12; Tr. 807. After Mr. Shoreman, Radio's counsel, determined the bank letter was defective (Tr. 809, 812), Mr. McFadden obtained a bank letter from Bank One. Scioto Exh. 13; Tr. 811. Ms. Murray had no prior business relationship with Bank One (Tr. 811) and did not provide any financial information to Bank One. Tr. 812. The bank letter is addressed "Dear Sir." Scioto Exh. 13.

59. Ms. Murray hired John M. Shoreman, an attorney at McFadden, Evans & Sill, at the suggestion of Mr. Roth, without knowing what his hourly rates would be. Tr. 731, 754. Ms. Murray also hired the engineer for Radio, without inquiring about or knowing his rates, solely on the basis of the recommendation of Mr. Shoreman. Tr. 804. Mr. Shoreman is also legal counsel to the Fresno partnership, in which Mr. Roth is a partner and MCC is the sole limited partner with an 85% equity interest. Tr. 731, 848. The Fresno partnership has a deferred billing arrangement with McFadden, Evans & Sill. Tr. 850-51.

60. Radio has a deferred billing arrangement with McFadden Evans & Sill, and Mr. McFadden is aware of this procedure. Tr. 745, 773, 775-76. This arrangement came about through an oral understanding, and is not contained in any writing. Tr. 745. The arrangment is that Radio will not pay its legal bills (and other expenses) until the proceeding is terminated. *Id.* McFadden Evans & Sill represents several other applicants before the FCC, and the vast majority of them do not have deferred billing arrangements with the firm. Tr. 1443, 1467, 1481-82, 1493. Mr. McFadden claims that he does not know the nature of Radio's billing arrangement with his firm. Tr. 1468. He concedes he does, however, receive information about the status of the accounts of his law firm's clients. Tr. 1456-57.

61. MCC does business out of the law offices of McFadden Evans & Sill. Tr. 1438. When Ms. Murray writes to Mr. McFadden at MCC, she sends the letters to the Washington, D.C. address of McFadden, Evans & Sill. Tr. 813, 1534. Letters from Mr. McFadden of MCC to Ms. Murray are written on McFadden, Evans & Sill's stationery. *See, e. g.*, Tr. 722. Ms. Murray could not recall ever

having seen MCC stationery. Tr. 823. Mr. McFadden's secretary, an employee of McFadden, Evans & Sill, performs work for MCC. Tr. 1515. MCC does not have any employees. Tr. 514-15.

62. Under the terms of Radio's Limited Partnership Agreement, the limited partners are only obligated to contribute up to $50,000 for pre-grant expenses. Radio Exh. 1, Att. 1 at 3; Tr. 755-57. If the application process requires more than $50,000, the limited partners can voluntarily contribute additional funds; if they do not, Ms. Murray is responsible for financing the additional costs. Tr. 756-57.

63. Ms. Murray has paid only $1,500 to Radio to date, which is less than her 15% partnership share. Tr. 786-89, 834-35. Mr. Roth has not made any contribution to the partnership to date, although he was required under the partnership agreement to advance $3,000 as an initial contribution. Tr. 763-64, 855-56. Ms. Murray has not made any capital calls to Mr. Roth, even though, under the partnership agreement, she has the right to make calls to the limited partners in accordance with their equity percentages. Tr. 764-65. Ms. Murray has made capital calls to MCC or McFadden for the hearing fee, publication fee, filing fee and engineering expenses. Tr. 765-69. McFadden has paid virtually all of these expenses, and MCC/McFadden's contribution to Radio exceeds its 80% pro rata share. *Id.* Mr. McFadden believes that he or MCC have contributed $10,000 to $15,000. Tr. 1527. Mr. McFadden has never seen Ms. Murray's financial statements, nor inquired about her financial capabilities. Tr. 1521. Mr. McFadden is not concerned that Mr. Roth and Ms. Murray have failed to meet their pro rata shares of Radio's costs. Tr. 1487, 1521-23.

64. On several occasions during the hearing Douglas McFadden invoked the attorney-client privilege and refused to comply with the presiding officer's directives to respond to the questions. Tr. 1445-47, 1450-51, 1453-54, 1467-68, 1472. Mr. McFadden also displayed a hostile and contemptuous attitude toward the presiding officer, and was an "obstreperrous", "belligerent", and totally uncooperative witness. E.g., Tr. 1445-47, 1450-51, 1453-54.

65. Ms. Murray lived in the Columbus service area from August 1985 to May 1988. Radio Exh. 2, at 1. While living in the area, Ms. Murray was a member of the International Association of Business Communicators and spent about 30 to 40 hours on its activities during the year. As a member of the organization from 1985 to 1987, she devoted about 15 to 20 hours to it each year. Radio Exh. 2, at 2; Tr. 815. She also was a member of the local chapter of the Notre Dame Club (1985-88), twice worked at Grandview Heights Friend of the Library Booksale (1986-87, devoting about six hours each year), and twice volunteered for the WOSU public television auction (1985-86, devoting about five or six hours each year). Radio Exh. 2; Tr. 816-17.

66. From 1980 to 1985, Ms. Murray worked at radio and television stations in Iowa and Indiana as an on-air personality, public service director and news reporter. Radio Exh. 2, at 4. Ms. Murray is female.

Clear Channel

67. Clear Channel is a Texas corporation where stock is publicly traded on the American stock exchange. Clear Channel Exh. 1, at 1. One stockholder, B. J. McCombs, owns 33.5% of the shares and L. Lowry Mays owns 34.5% of the shares. It does not propose integration of ownership into management. Clear Channel Exh. 1, at 1.

Horace E. Perkins

68. Mr. Perkins is an individual applicant. Perkins Exh. 1, at 1. He proposes to work full time, 40 hours per week, as the general manager and sales manager of the station. Perkins Exh. 1, at 1. He will oversee all aspects of the station's operation. *Id.* Perkins lives in Columbus and has for the last 26 years. *Id.* He has worked at station WVKO(AM) in Columbus since March 1963. *Id.* Mr. Perkins is an African American. *Id.*

Diversification of Control of the Media of Mass Communications

Mid - Ohio

69. Neither Mid-Ohio nor its general partner, Joseph Hewitt, has an interest in the medium of mass communications. Mid-Ohio Exh. 5. Hubert B. Payne, a limited partner holds 12% of the stock in Channel 19, Inc., the licensee of station WOIO-TV, Shaker Heights, Ohio; and 400 shares of the Tribune Company, a multiple licensee. *Id.* The Tribune shares constitute less than 1% of the stock of the Tribune Company. *Id.*

Scioto

70. Neither Scioto, its general partner, nor any of its limited partners have an interest in a medium of mass communications. Scioto Exh. 1.

Radio

71. Radio and its general partner, Karen Murray, do not have an ownership interest in an existing medium of mass communications. Radio Exh. 3. William Roth was the general manager, vice president and a 5% owner of Quad Cities d/b/a KLIO/K-Lite, the licensee of station KLIO-FM, Clinton, Iowa at the B cutoff date in this proceeding. Radio Exh. 3; Tr. 844-45. Mr. Roth is presently the general manager of KLIO-FM, which is now licensed to Arrow Communications. Tr. 844-45.

Clear Channel

72. Clear Channel is the licensee of the following radio stations: WOAI(AM) and KAJA-FM, San Antonio, Texas; KPEZ-FM, Austin, Texas; KALO(AM) and KHYS-FM, Port Arthur, Texas; KTAM(AM) and KORA-FM, Bryan, Texas; KAKC(AM) and KMOD-FM, Tulsa, Oklahoma; KTOK(AM) and KJYO- FM, Oklahoma City, Oklahoma; WELI(AM), New Haven, Connecticut; WQUE(AM) and WQUE-FM, New Orleans, Louisiana; and WHAS(AM) and WAMZ-FM, Louisville, Kentucky. Clear Channel Exh. 2.

73. Clear Channel, through its wholly-owned subsidiary Clear Channel Television, Inc., is the licensee of the following television stations: WPMI-TV, Mobile, Alabama and KDTU-TV, Tucson, Arizona. *Id.* Clear Channel Television, Inc. is the proposed assignee of Station KOKI-TV, Tulsa, Oklahoma (*Id.*) and Station WAWS-TV, Jacksonville, Florida.

74. Clear Channel is the licensee of a low power television station ("LPTV") in College Station, Texas (K28AK). *Id.* It has been awarded construction permits for new

LPTV stations in Corpus Christi (K22BH), San Antonio (Channel 17), and Waco (K62CY), Texas, and Oklahoma City (K69EK), Oklahoma. *Id.* It has filed an application (File No. BPTTL-880624SH) for a new LPTV station in Temple, Texas (Channel 16). *Id.*

75. Clear Channel is the owner and operator of the Oklahoma News Network, a satellite-delivered (wired) network serving stations primarily in Oklahoma. *Id.* KTOK, KMOD, and KAKC are affiliated with the Oklahoma News Network. *Id.*

76. L. Lowry Mays, President and Chief Executive Officer, a Director and 34.5% shareholder in Clear Channel, is a member of the Board of Regents of Texas A & M University, licensee of KAMU-TV and KAMU-FM (Educational), College Station, Texas. *Id.*

77. B. J. McCombs, a Director and 33.5% shareholder in Clear Channel, owns 30 percent of San Antonio Channel 2, Inc., the permittee of LPTV station KO2MX, San Antonio, Texas, and is an 80 percent limited partner of Fredericksburg Channel 2, and an applicant (File No. BPCT- 870212KP) for TV Channel 2, Fredericksburg, Texas. *Id.* Also, B. J. McCombs' daughters, Marcia McCombs Shields, Connier McCombs McNab, and Lynda McCombs Rubie, together own an additional 30 percent of San Antonio Channel 2, Inc. *Id.*

Perkins

78. Perkins has no interest in a medium of mass communications. Perkins Exh. 1.

Auxiliary Power

79. Mid-Ohio will install an auxiliary power supply at both its transmitter and studio locations. Mid-Ohio Exh. 6. Scioto will also. Scioto Exh. 3. Radio will install an auxiliary power system. Radio Exh. 4. Perkins will install an auxiliary power generator. Perkins Exh. 2.

CONCLUSIONS

Mid - Ohio's Financial Qualifications

80. Mid-Ohio general partner Joseph Hewitt certified to the Commission that Mid-Ohio is financially qualified. When the Mass Media Bureau tested Mr. Hewitt's certification, it concluded that Mid-Ohio had not established a basis for or the validity of its cost estimates. The Bureau found that Mid-Ohio, in mid-May 1987, used estimates that had been prepared in 1984 for Upper Arlington, Ohio, a suburb of Columbus. Mid-Ohio failed to explain why the estimates prepared three years earlier were valid for its proposal. It also found that Mid-Ohio had not included any amount for installation of equipment or for the first three months' operating expenses. In addition, while Mid-Ohio patterned its proposal after that made for Upper Arlington, its cost estimate of $351,000 was only half of the $662,183 projected for Upper Arlington.

81. The Bureau also found that although Mid-Ohio represented that its partners would finance the proposal in proportion to their shares in the partnership, the partners had not supplied documentary support for their promises. When the Bureau tested general partner Hewitt's obligation to provide $196,855, it found he had a negative liquid net worth. Mr. Hewitt's additional claim that the other partners would lend him money was found by the Bureau to be unsupported. Although the Bureau did not test the financial ability of the other partners to make their contributions, it did find that the the contributing partners would only provide 95% of the needed equity which left Mid-Ohio 5% or $32,809 short of meeting its estimated costs of construction and operation.

82. Mr. Hewitt concedes that he had made a number of errors when he determined the applicant's financial qualifications. He claims that he misread the Upper Arlington proposal. First he used the amount listed as equity in Upper Arlington as Mid-Ohio's proposed operating costs. He also used the amount proposed for bank debt in Upper Arlington as Mid-Ohio's figure for total equipment expenditures. In fact, he admitted that if he had used the proper figures, Mid-Ohio would have needed $513,000. Mr. Hewitt's explanation for this bizarre confusion of numbers is implausible. The cost and revenue estimates of the Upper Arlington FM proposal are clearly labeled and, when Mr. Hewitt was tested on his ability to identify how much cash would be required and the first quarter estimated cost of operations in the Upper Arlington proposal, he was able to do so with little effort and no assistance. All items in the Upper Arlington proposal were clearly labeled and easy to read.

83. As for the other questions raised by the Bureau, Mr. Hewitt admitted that he did not adjust the dated material prepared for Upper Arlington to coincide with 1987 prices. He also did not consider what it would cost to install the equipment. His facile explanation is that he assumed that because the equipment is $163.000, that amount must include installation. Again, as the Bureau pointed out, the Upper Arlington analysis specifically indicated that the $163,000 did not include installation. Mr. Hewitt's testimony indicates that he gave no thought to what he was doing. While he claims that he followed the Upper Arlington estimates, there is no reasoned explanation for how he obtained his estimates, or for that matter, that he performed any analysis at all. His excuse of ineptness is all the more unbelievable because he claims that he had the instructions to Form 301 for guidance, the Commission's most recent public notice on certification, the assistance of counsel, and familiarity with broadcasting as a station employee. While he admits that he did not spend much time on Mid-Ohio's estimated costs, that claim is an exaggeration. There is no reliable evidence or documentation that he spent any time estimating costs of operation and construction. The only documents that Mid-Ohio was able to produce had nothing at all to do with Mid-Ohio's proposal. It was prepared three years before for another community, apparently by persons who are not associated with Mid-Ohio. Mid-Ohio's certification that it had determined the cost of construction and operation for three months is not supported with reliable evidence. Mid-Ohio provided no contemporaneous records to show that it undertook any cost analysis before it certified and it did not produce any testimony from anyone who could have corroborated Mr. Hewitt's explanation. Mr. Hewitt admits he knew what he needed to do. The record reflects, however, that, although he did not analyze what it would cost to develop Mid-Ohio's proposal, he represented to the Commission that he had made the required determination.

84. There is also no reliable evidence that Mr. Hewitt had net liquid assets on hand or committed sources of funds to construct the proposed facility and operate for three months without revenue. There is no claim by Mid-Ohio that it had net liquid assets on hand. But it did

claim that its partners had net liquid assets available to provide the $513,000 that was estimated to be needed in Upper Arlington, or for that matter the $351,000 that Mr. Hewitt claims he determined would be needed to finance the station if Mid-Ohio relied on the Upper Arlington analysis.

85. Mr. Hewitt has not established that he had any liquid assets at the time of certification. His secondary claim, that Hubert Payne, a limited partner, would provide the money, if he could not, is not based on any agreement and it is not known whether Mr. Payne has sufficient liquid assets to provide Mr. Hewitt with the amount he needs. Mr. Payne claims his 10% interest in a privately held television station in Cleveland is liquid because he has a put agreement. Mr. Payne has not demonstrated that that asset is liquid or, if it is, there will be enough money to meet all his promises to provide financing for various applications and, in addition, to lend money to Mr. Hewitt and to Val King, another limited partner. Mr. Payne estimates that he has $180,000 in net liquid assets. He has a commitment of $25,000 to a Baton Rouge proposal, $75,000 to an Albuquerque proposal, $60,000 to a Beaumont proposal and so on. The hearing testimony does not establish that Mr. Payne has sufficient liquid assets, nor does it explain what claims there were on those assets at the time of certification. It appears unlikely that Mr. Payne could meet his own promises at the time of certification to Mid- Ohio of nearly $100,000 and lend money to other owners to meet their obligations.

86. Dominic Ozanne relies on a line of credit which has been extended by the AmeriTrust Bank to a construction company which he heads and owns 25% of. Mr. Ozanne has not offered any assurance that the line of credit could be used for this proposal which is unrelated to his construction business. In addition, Mr. Ozanne has not provided an accurate account of how much money he has committed to other applications. Darrell Fields, another limited partner, claims he has the right to a $40,000 certificate of deposit. But that certificate is in his spouse's name with her father acting as trustee. There is no written agreement that he can use that money. Mr. Fields, like the other Mid-Ohio partners, has not demonstrated that, if the $40,000 were available, he does not have other commitments for the money. Val King, a limited partner, relies on a home equity loan to obtain his share. That share, like all limited partners, was over $100,000 at the time of certification and he only had $17,000 in equity in his house. He has provided no statement from any bank about how much he could borrow on his house.

87. Mr. Hewitt relied on his belief that the other partners could provide the needed funds. The record reflects that there is no basis for that belief and that, at the time of certification, Mr. Hewitt did not determine whether Mid-Ohio had available net liquid assets to finance his proposal. Mr. Hewitt concedes that he knew what he needed to do to certify. He certified, however, without the necessary assurance. Moreover, if he had undertaken the necessary analysis, he could not have certified that Mid-Ohio was financially qualified. There is no doubt remaining after this hearing that Mr. Hewitt's representations about Mid-Ohio's financial qualifications are unreliable and untruthful. Mid-Ohio is not the sort of applicant that the Commission can rely on to comply with regulatory requirements; it is not qualified to be compared with the other applicants.

The City Coverage Issue

88. None of the applicants are able to provide 80% coverage of the entire city of Columbus, although each will cover at least 71.4% of the city. The Mass Media Bureau has supported waiving the city coverage rule, §73.315(a), because the area of the city is too great to permit coverage of 3.16 mV/m with a Class A FM channel. The failure to cover the entire city is ameliorated, the Bureau believes, by the fact that the applicants will cover 85% or more of the population. A waiver will be granted to every applicant.

The Environmental Impact of Perkins' Proposal

89. Perkins has agreed to a condition requested by the Bureau to comply with environmental regulations and, therefore, the issue is resolved.

The Comparative Issue

Promise of owners to work full time at the station in management positions.

90. Because Mid-Ohio is unqualified, only four applicants are entitled to comparison: Scioto, Radio, Clear Channel, and Perkins. Clear Channel does not propose that any of its owners will work at the station; therefore, only Scioto, Radio and Perkins have competitive proposals.

Scioto

91. Scioto's general partner, Paul D. Warfield, proposes to work full time, 40 hours per week, as the station's general manager. Scioto is, therefore, entitled to 100% credit for its proposal to combine ownership control with management. Two arguments are asserted for discounting Mr. Warfield's promise. Mid-Ohio argues that Mr. Warfield will not spend 40 hours per week at the station because he intends to operate a Burger King franchise. Mr. Warfield applied for a franchise from Burger King, in 1986, before Scioto filed this application. He did so only under the condition that his partner would undertake the day-to-day management. Tr. 675-76. When his partner decided not to proceed with the application, Mr. Warfield indicated he was not interested either. They sent a letter to Burger King in which they explained that they did not intend to pursue the venture together. Tr. 551. Mr. Warfield does not consider himself an applicant for the franchise. Tr. 678-79. Mid-Ohio also urges that Mr. Warfield is discussing employment with the Mid-America Football Conference. Mr. Warfield claims he has shown minimal interest and there has been no meeting of the minds. Tr. 643-44.

92. Mr. Warfield, Mid-Ohio also urges, has not demonstrated that he will leave or curtail his current employment. He currently works 20 hours per week as the director of marketing and sales for Ernie Green Industries, a manufacturing firm. Tr. 637. He is also president and 51% owner of Warfield & Morgan Associates, a temporary services contractor, to which he devotes an additional 20 hours per week. Mr. Warfield testified that he will quit his employment with Ernie Green Industries (Tr. 662) and that he will devote considerably less than 20 hours per week to Warfield & Morgan Associates. Tr. 548. Mr. Warfield stated he would be able to reduce his hours because his 49% partner had previously managed the business on his own and it is Mr. Warfield's intention to

turn over the day-to-day business operations to his partner. Tr. 548-49. Mr. Warfield also stated that his wife would become active in the company. Tr. 549 The record does not support Mid-Ohio's claim that Mr. Warfield will not be available to work 40 hours per week.

93. Radio claims that Scioto's counsel is in control of the applicant and that Mr. Warfield is not. Radio has not requested a real-party-in-interest issue. Radio claims that Scioto's counsel controls because he advised Scioto to organize as a partnership; prepared the partnership agreement; recommended an engineer; arranged to have the partnership agreement filed in Ohio; and recommended that Scioto propose auxiliary generators. Scioto points out that Mr. Warfield stated that he told counsel to organize the applicant in order to insure that he would be in charge and it was then that counsel suggested a limited partnership. Tr. 525-26. Mr. Warfield asked counsel for help in obtaining an engineer only after he had been unsuccessful in finding one himself. Tr. 527. Scioto points out that Mr. Warfield did undertake some of the organizational tasks. He established the public inspection file and arranged for publication of notice. Tr. 584-85. In addition, Scioto responds that Mr. Warfield contacted the FCC to find out how to pursue a broadcast application (Tr. 519), identified and retained counsel, sought an engineer, recruited Scioto's limited partners, prepared and reviewed the application and obtained a transmitter site. Tr. 522-33; 544. Given these facts, Radio has not demonstrated that Mr. Warfield will not exercise control over the partnership if a grant is made.

Radio

94. Radio's only general partner, Karen Murray, proposes to work full time, 40 hours per week, at the station as the general manager. Ms. Murray holds only 15% of the equity; there are two limited partners, McFadden Communications Corporation, which holds 80% of the equity, and William Roth, who holds 5% of the equity. The opposing applicants all argue that Ms. Murray will not be in complete control of the applicant and some urge that she will not exercise any control.

95. The opposing applicants claim Ms. Murray lacks control because she has a small interest, she failed to organize the applicant, she has not contributed her equitable share of the expenses, and that Douglas McFadden, who controls McFadden Communications, has essentially directed the course of the applicant. Radio has no operational experience; therefore, it is largely its organizational activities and its participation in this hearing that offer a view of how the partnership operates. General partner Murray learned about the frequency from Mr. Roth. He is pursuing an application for Fresno, California with Mr. McFadden's company, McFadden Communications, and both applicants have had as their counsel John M. Shoreman, a lawyer in McFadden, Evans & Sill. Mr. Roth had worked at a broadcast station with Ms. Murray and he suggested that she ask Mr. McFadden if he would agree to join in the proposal. The three partners met at the airport in Columbus to discuss the partnership. Preceding that meeting, however, Mr. McFadden provided a partnership agreement which governs the partnership and identifies the partners' ownership. Ms. Murray stated that she accepted the partnership interest Mr. McFadden offered. Throughout the proceeding, apparently after Mr. McFadden organized the applicant, an associate in Mr. McFadden's law firm, McFadden, Evans & Sill, represented Radio. It is Mr. McFadden's claim that the firm does not consult him about Radio's proposal. However, at the same time, Radio has not been expected to pay any fees to the firm and has paid none.

96. It is Radio's claim that Ms. Murray acted independently and that she was not directed by Mr. McFadden and Mr. Roth. She claims she hired Mr. Shoreman and the applicant's engineer. She nominally did. However, she selected Mr. Shoreman at Mr. Roth's suggestion and failed to even find out what he would charge per hour. The engineer she hired was suggested by Mr. Shoreman and again she did not inquire about his rates. Moreover, even with regard to these very perfunctory actions, there is only Ms. Murray's word that she carried them out. While it appears that she did, the record indicates she was doing what someone else suggested.

97. From the few decisions that were made in organizing the applicant and preparing the application, it is not possible to conclude that Ms. Murray would not eventually exercise control. It is not unusual for a limited partner such as Mr. McFadden, who is a lawyer, to provide a partnership agreement. Moreover, Mr. McFadden or his communications company has participated in numerous broadcast applications. Thus, the fact that he was knowledgeable about the method for organizing and pursuing a proposal before the Commission was to be expected. Whether he will exercise authority over the broadcast operations is not necessarily evident by those activities. It is apparent, however, that Mr. McFadden has had a significant impact on how the applicant meets its financial obligations. While it might be expected that a limited partner would finance legal and filing fees, Mr. McFadden's law firm has not collected any fees. Ms. Murray, who it might be expected, as the general partner, would at least know how that arrangement came about, did not know that or even what the firm's charge would be. While she has a financial obligation for partnership expenses, thus far she has not directly provided the partnership with her share. She stated that she paid various expenses that she incurred and which she also deducted from her personal income tax. Her testimony on this point is unreliable. Her demeanor during questioning was agitated and defensive. She made different claims about the money she has contributed. *Compare*, Tr. 786-89, 834-35. When she was asked for details, she refused to answer and would say only that she had agreed to tell the truth. The only objective record evidence establishes that those bills that have been paid were paid by McFadden Communications.

98. While Ms. Murray testified on the applicant's behalf, at all other times the knowledge and resources of the limited partner, the limited partner's owner, or the limited partner's law firm have perfected Radio's proposal.

99. Perkins argues that Ms. Murray's failure to contribute her financial share places her in a vulnerable position. According to the partnership agreement, the limited partners need only contribute $50,000. Expenses beyond that amount would, Perkins argues, become Ms. Murray's obligation. That "threat," Perkins maintains, makes Ms. Murray vulnerable to the limited partners' directions. That may be the case, but there is no evidence to support the conclusion Perkins urges. It may be that Ms. Murray could provide the needed financing. Perkins claims that McFadden and his law firm have been carrying Ms. Murray's capital share and the threat of their demand for her share also makes her subject to their

control. While the possibility exists, there is, as has just been pointed out, no evidence that she could not provide her share if she needs to do so.

100. Mid-Ohio urges that when a lawyer takes an equity interest and simultaneously performs legal services, the lawyer cannot be considered a passive investor. Mr. McFadden claims that once his firm was hired, he was not consulted about the applicant's legal affairs and he did not personally provide legal assistance. This separation was specifically undertaken to avoid a finding that he was active in the applicant's affairs to meet the principle enunciated in *Doylan Forney*, 3 FCC Rcd 6330, 6332 (Review Bd. 1988). There is no evidence that after Mr. McFadden organized the applicant that he made any legal decisions, except for deciding to pay money owed by the applicant. While Mr. McFadden refused to answer various questions and was uncooperative, there is no reason to doubt that he did not provide legal services to the applicant, and that only his law firm provided the services without consulting him. Mr. McFadden acted like the lawyers Sanchez and Jenkins in *Victory Media, Inc.*, 3 FCC Rcd 2073, 2074 (1988). There the Commission found that Sanchez and Jenkins' role in organizing the applicant and initially providing legal services did not alter their passive status. The Commission observed that neither Sanchez nor Jenkins had a history of broadcast operation. There is no evidence that Mr. McFadden has any interest in operating the station. Ms. Murray lived in Columbus at the time Radio made its proposal and she had lived there since 1985, for a period of two years and nine months. And from 1980 to 1985 she worked at broadcast stations. Shaky as Ms. Murray's role has been in organizing and pursuing the proposal, it cannot be concluded that Ms. Murray would not work full time, 40 hours per week, managing the station. She is entitled to some integration credit. However, it is unestablished that Ms. Murray will be the station's general manager since the partnership agreement provides that her management role will be determined by contract with the partnership after a grant is made. The partnership agreement is silent about who will make that determination and Ms. Murray did not know who would either.

Clear Channel

101. Clear Channel's owners do not propose managing the station.

Perkins

102. Horace Perkins will work full time, 40 hours per week, as the general manager and sales manager at the station. Communications argues that because Mr. Perkins intends to sell advertising he cannot be fully credited with a management position. Mr. Perkins, however, as he points out in his reply, made clear that he would primarily manage but because of his long association with sales in Columbus, he would be unable to avoid longtime advertisers. There is no indication that he will not spend most of his time managing the station. *See Tulsa Broadcasting Group*, 2 FCC Rcd 6124, 6128 (Review Bd. 1987).

Conclusion

103. Scioto, Radio, and Perkins all present nearly equal quantitative proposals. Radio's general partner claims that she will be the general manager, as does the general partner in Scioto, Paul Warfield, and the individual applicant, Horace Perkins. But Radio's partnership agreement specifically provides that the management role of the general partner, Karen Murray, will be decided after a grant is made and will be governed by a contract to be written at that time. Moreover, the partnership agreement does not indicate, and Ms. Murray does not know, who will make that determination. That uncertainty, along with her passive role in organizing and pursuing a grant of the application, leaves uncertain and unestablished whether she will be the general manager, as she asserts, and whether she will even make the decision about what role she will have. It is evident that Scioto's general partner, Paul Warfield, and Horace Perkins will definitely act as the general manager of the station. There is no question about their policy making functions or their role in management. Paul Warfield and Horace Perkins will each occupy the general manager's position, the most important policy position. On comparative quantitative grounds, Scioto and Perkins are to be preferred over Radio.

104. Each of the applicants also has qualitative attributes that enhance their quantitative proposals. Mr. Warfield, Ms. Murray, and Mr. Perkins have all lived in Columbus or the area. Mr. Perkins has lived in Columbus continuously since 1963. Neither Mr. Warfield nor Ms. Murray have had a long association with the community. Ms. Murray lived in the Columbus service area for two years and nine months from August 1985 to May 1988. She would move back if a grant were made. Mr. Warfield was a college student in Columbus for a little over four years beginning in 1960. He did not live there again until after Scioto filed its application in 1987. From June 1987 to October 1988, he lived part-time in the Columbus area. And since November 1988 he has made his full-time home in Gahanna, Ohio which is within the service area. There is no doubt that Mr. Perkins presents a longtime continuous association with Columbus and Scioto and Radio do not. Nevertheless, Paul Warfield has exhibited an active participation in civic affairs during the time he has been associated with Columbus and Karen Murray has also demonstrated an interest in the community by participating in local activities during her short residence. Mr. Perkins does not have any record of civic participation or any other activity which would indicate a knowledge of and interest in the welfare of the community. However, the Commission believes that local residency by itself "indicates a likelihood of continuing knowledge of changing local interests and needs." *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C. 2d 393, 396 (1965). It cannot be concluded that Mr. Warfield and Ms. Murray's local activities outweigh Mr. Perkins' longtime, continuous residence in Columbus. Both Mr. Perkins and Mr. Warfield receive a preference because they are African Americans and Ms. Murray receives a lesser preference because she is female.

105. Ms. Murray, Mr. Warfield, and Mr. Perkins all have broadcast experience but on this criterion Mr. Perkins also is to be preferred because his experience is full time, continuous and of long duration. Mr. Perkins has worked at a radio station in Columbus since 1963. Ms. Murray worked at broadcast stations from 1980 to 1985. After 1985, she did not work as a broadcaster. Mr. Warfield has worked in broadcasting over a 16 year period but during those years he worked only a few months each year on a part-time basis. Mr. Perkins is to be preferred for his broadcast experience over Scioto and Radio. Over-

all, Mr. Perkins is to be preferred over Scioto and Radio because of his longtime residence in the community, his longtime broadcast experience and his proposal to work full time as the general manager. He is also preferred over Radio because he is an African American.

Diversification of control of the media of mass communications

106. Perkins, Scioto and Radio and their owners have no attributable media interests. Communication has substantial interests in the mass media and is least preferred. Perkins, Scioto and Radio, because they have no media interests are equally preferred.

Auxiliary Power

107. All the applicants but Communications will install an auxiliary power supply.

108. Perkins is to be preferred over the other applicants because of his superior integration proposal.

ACCORDINGLY, IT IS ORDERED that the petition to reopen the record, filed September 11, 1989 by Mid-Ohio Radio Limited IS DENIED.

IT IS FURTHER ORDERED that the motion for disqualification of counsel for Horace E. Perkins, filed September 11, 1989 by Mid-Ohio Radio Limited IS DENIED.

IT IS FURTHER ORDERED that the petitions to enlarge issues against Clear Channel Communications, Inc. and Horace E. Perkins, filed September 11, 1989 by Mid-Ohio Radio Limited ARE DENIED.

IT IS FURTHER ORDERED that the requests for extension of time (1) and (2), filed September 13, 1989 by Horace E. Perkins ARE GRANTED.

IT IS FURTHER ORDERED that the request for extension of time, filed September 13, 1989 by Clear Channel Communications, Inc. IS GRANTED.

IT IS FURTHER ORDERED that the motions for protective order, filed September 26, 1989 by Clear Channel Communications, Inc. and Horace E. Perkins ARE DISMISSED AS MOOT.

IT IS FURTHER ORDERED that the petition for leave to amend, filed October 24, 1989 by Clear Channel Communications, Inc. IS GRANTED and the amendment IS ACCEPTED.

IT IS FURTHER ORDERED that the petition for leave to amend and amendment accepting condition, filed August 15, 1989 by Horace E. Perkins IS GRANTED and the amendment IS ACCEPTED.

IT IS FURTHER ORDERED that the petition to reopen the record and receive additional testimony of Karen Murray, filed September 27, 1989 by Mid-Ohio Radio Limited IS DENIED.

IT IS FURTHER ORDERED that the applications of Mid-Ohio/Capitol Communications Limited Partnership (File No. BPH- 870515MK), Scioto Broadcasters, Limited Partnership (File No. BPH-870514MU), Mid-Ohio Radio Limited (File No. BPH-870515NM), Clear Channel Communications, Inc. (File No. BPH-870515NN) ARE DENIED and the application of Horace E. Perkins (File No. BPH-870515NP) for a construction permit for a new FM station on Channel 298A in Columbus, Ohio IS GRANTED subject to the following condition:

Before test authority is authorized by the Commission permittee shall submit documentation of compliance with this special operating condition along with the Form 302, application for license, and the request for PROGRAM TEST AUTHORITY. The permittee shall, upon completion of construction and during the equipment test period, make proper RF field strength measurements throughout the tower area to determine if there are any areas that exceed the ANSI, EIP and FCC specified guidelines for human exposure to radio frequency radiation. If necessary, a fence must be erected at such distances and in such a manner as to prevent the exposure of humans to radio frequency radiation in excess of the American National Standards Institute Guidelines (OST Bulletin No. 65, October 1985). The fence must be of a type which will preclude casual or inadvertent access, and must include warning signs at appropriate intervals which describe the nature of the hazard. Any areas within the fence found to exceed the recommended guidelines must be clearly marked with appropriate visual warning signs.[3]

FEDERAL COMMUNICATIONS COMMISSION

Edward J. Kuhlmann
Administrative Law Judge

FOOTNOTES

[1] The partnership agreement provides that, if the station is awarded to Radio, the general partner will enter into an employment agreement with the partnership to "act as general manager, sales manager, business manager, program director or other manager of the station, devoting 40 hours per week to her duties in this capacity." Radio Exh. 1, Att. A, at 5; Tr. 794. Ms. Murray does not know who would draft the contract (Tr. 798) or why the partnership agreement does not specify the position she proposes. Tr. 797.

[2] MCC is the 85% limited partner in Fresno Valley Radio Limited, applicant for a new FM station at Fresno, California. Tr. 1495-96. MCC is the 85% limited partner in Southern Indiana Broadcasting Limited, applicant for a new FM station at Mount Vernon, Indiana (Tr. 1480-81), and a shareholder in Champaign-Urbana Broadcasting Corporation, applicant for a new FM station at Champaign, Illinois. Tr. 1490-92.

[3] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
December 20, 1989

Released: January 22, 1990

Mr. Howard H. Keller
Southern Virginia Broadcasting Corporation
121 Wyck Street, Suite 300
Richmond, Virginia 23225

Re: Application for Renewal
of Stations WSVS/WSVS-FM

Dear Mr. Keller:

This refers to your pending application for license renewal for stations WSVS/WSVS-FM, Crewe, Virginia (File Nos. BR-880531VV and BRH-880531ZQ). Review of your EEO record for the license term reflects a failure to comply with the Commission's equal employment opportunity rule.

Section 73.2080 of the Commission's Rules, 47 C.F.R. Section 73.2080, requires that a broadcast licensee refrain from employment discrimination and establish and maintain an affirmative action program reflecting positive and continuing efforts to recruit, employ, and promote qualified women and minorities. When evaluating EEO performance at renewal time, the Commission focuses on the licensee's efforts to recruit and promote qualified minorities and women as well as the licensee's ongoing assessment of its EEO efforts. The latter enables the licensee to take corrective action if qualified minorities and women are not present in the applicant pool. The Commission also looks for any evidence of discrimination by a licensee. *See* Sections 73.2080 (b) and (c) of the Commission's Rules, 47 C.F.R. Sections 73.2080 (b), 73.2080 (c).

When the renewal application indicates an adequate record of EEO efforts, the application is granted, if otherwise appropriate. When the application indicates an inadequate record of EEO efforts, the Commission may impose a variety of sanctions or remedies, such as reporting conditions, renewal for less than a full term, forfeiture, or a combination thereof. Further, the Commission may designate the renewal application for hearing if the facts so warrant. *Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services*, 2 FCC Rcd 3967 (1987), *petition for reconsideration pending; See* 4 FCC Rcd 1715 (1989) (request for clarification by National Association of Broadcasters). *See also Beaumont Branch of the NAACP and the National Black Media Coalition v. FCC*, §54 F.2d 501 (D.C. Cir. 1988); *Bilingual Bicultural Coalition On Mass Media, Inc. v. Federal Communications Commission*, 595 F.2d 621 (D.C. Cir. 1978).

Our review of your renewal application and your response to our inquiry reveals no evidence of discrimination but does reveal an inadequate record of EEO efforts. The information you have submitted indicates that, during the license term, you neither recruited minorities nor analyzed your efforts to recruit, hire, promote, and retain minorities, as required by Section 73.2080 of the Commission's Rules. From July 1985 through September 1988, you solicited no female or minority referral sources for the 15 vacancies on your full-time staff. In September 1988, your new General Manager contacted the Nottoway NAACP for future referrals, but the arrangement yielded no applicants during the last two months of the license term. Moreover, while you state that you have been in contact with local colleges for the past three years, the only recruitment sources that yielded applicants were advertisements on-air and in a local newspaper.[1]

Your recordkeeping has also been inadequate. Your records do not reveal the gender, race or number of applicants in the job pool for each vacancy.[2] In addition, while your 1987 Annual Employment Report (FCC Form 395-B) lists one full-time Black lower-level employee, our review revealed no Black full-time hires. You later stated that the Black employee should have been categorized as a part-time service worker.

The record before us is similar to *Application of Woolfson Broadcasting Corporation for Renewal of License of Stations WSBY / WQHQ - FM, Salisbury and Ocean City, MD*, 4 FCC Rcd 6160 (1989) (*WSBY / WQHQ)*. In *WSBY / WQHQ*, we found that the licensee neither followed its EEO program nor hired any minorities despite 33 full-time hiring opportunities from February 1986 through September 1988 in an area where Blacks constitute 19.1% of the labor force. The licensee of WSBY/WQHQ used minority recruitment sources for only 14 of those 33 vacancies and received only two minority referrals. Nor did WSBY/WQHQ attempt to expand its list of minority recruitment sources until the end of the license term. Accordingly, we granted a short-term renewal subject to reporting conditions and a $15,000 forfeiture.

WSVS/WSVS-FM appears to have exerted even less effort to recruit minorities than did WSBY/WQHQ. WSVS/WSVS-FM, like WSBY/WQHQ, did not attempt to improve its EEO record until the end of the license term. Moreover, the Crewe, Virginia labor force includes substantial Black representation (37% versus 19.1% for WSBY/WQHQ). Nonetheless, we are mindful that WSVS/WSVS- FM had fewer hiring opportunities than did WSBY/WQHQ (15 versus 33), and that WSVS/WSVS-FM employed, on average, a full-time staff of only twelve persons during the license term (versus 25 for WSBY/WQHQ). We will therefore grant renewal for a short term subject to reporting conditions and a Notice of Apparent Liability for Forfeiture in the amount of $15,000.

WSVS/WSVS-FM have repeatedly failed to comply with the Commission's affirmative action provisions set forth in Sections 73.2080 (b)(3), (b)(5), (c)(2), and (c)(5) of the Commission's Rules, 47 C.F.R. Sections 73.2080 (b)(3), 73.2080 (b)(5), 73.2080 (c)(2), 73.2080 (c)(5). We have determined, however, that the facts in this case present no evidence of intentional discrimination. In view of the foregoing, as well as our review of pertinent case precedent in this area, we conclude that sanctions and remedies are appropriate.

Accordingly, *IT IS ORDERED*, that the applications of the Southern Virginia Broadcasting Corporation for renewal of licenses for stations WSVS/WSVS-FM *ARE GRANTED FOR A SHORT TERM* ending October 1, 1991, subject to the reporting conditions specified herein.

IT IS FURTHER ORDERED, that, pursuant to Section 503 of the Communications Act of 1934, as amended, 47 U.S.C. Section 503, Southern Virginia Broadcasting Company is hereby advised of its apparent liability for forfeiture of $15,000 in light of its repeated failure to comply with Section 73.2080 of the Commission's Rules, 47 C.F.R. Section 73.2080, in the manner described above.

IT IS FURTHER ORDERED, that the licensee of stations WSVS/WSVS-FM is directed to submit to the Commission an original and one copy of the following information on August 1, 1990, August 1, 1991, and August 1, 1992:

(a) For the August 1, 1990 report, a list of all job vacancies during the 12 months preceding July 1, 1990, and for the August 1, 1991 and August 1, 1992 reports, a list covering the 12 months preceding July 1, 1991, and July 1, 1992, respectively, indicating the job title and full-time or part-time status of the position, the race or national origin, sex, and the referral source of each applicant for each job, and the race or national origin and sex of the person hired; [3]

(b) A list of employees as of the July 1, 1990 payroll period for the first report and as of the July 1, 1991 and July 1, 1992 payroll periods for the second and third reports by job title, indicating full-time or part-time status (ranked from highest paid to lowest paid), FCC Form 395-B classification, date of hire, sex, and race or national origin; and

(c) Details concerning the stations' efforts to recruit Blacks for each position filled during the 12-month periods specified, including identification of sources used and indicating whether any of the applicants declined actual offers of employment.

In addition, the licensee may submit any information it believes relevant regarding the stations' EEO performance and its efforts thereunder. The reports are to be filed with the Secretary of the Commission for the attention of the Mass Media Bureau's EEO Branch.

Should you have any questions regarding this action or require further information concerning the employment reports, you may telephone the Mass Media Bureau's EEO Branch ((202) 632-7069). With respect to the forfeiture proceeding, you may take any of the actions set forth in Section 1.80 of the Commission's Rules, 47 C.F.R. Section 1.80, as summarized in the attachment to this letter. Any comments concerning your ability to pay should include those financial items set forth in the attachment.

BY DIRECTION OF THE COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] We note your statement that in May 1988, the stations advertised for sales positions via advertisements on-air and in the local newspaper, and that nine persons applied, including one Black female. You state that the Black applicant was extended an offer of employment, which she declined. You also assert that during the past three years you contacted area colleges for referrals. In addition, your EEO program report (FCC Form 396) for the 1988 reporting year lists the Nottoway Civic League as a referral source.

[2] The available labor force for Crewe, Virginia is 37.4% minority (37.0% Black, 0.4% Hispanic). Data for the reporting year, *i.e.*, the 12-month period prior to submission of your stations' renewal applications, reveals an absence of Blacks on your full-time staff of eight, including seven employees in upper-four positions. Of three full-time hiring opportunities during the reporting year, no minorities were hired. Employment reports for 1985 through 1988 also reveal an absence of Blacks from your full-time staff, which ranged from 8 to 16 employees over the term of the license. Of 15 full-time hiring opportunities from 1985 to 1988, no minorities were hired.

[3] Such a list might start:

(1) News Director; Officials and Managers; Full-time

3 Applicants:	1 White Female; A.W.R.T.
	1 Black Male; Urban League
	1 Black Female; NAACP

Sources Contacted: Local Newspaper, A.W.R.T., Urban League, NAACP

Selected: Black Male (03/15/91)

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Ameritech Operating Companies Revisions to Tariff F.C.C. No. 2	Transmittal Nos. 376, 377, 378, 379, 381, 382, 383, 386, 387, 389, and 390
Nevada Bell Telephone Company Revisions to Tariff F.C.C. No. 1	Transmittal No. 90
Pacific Bell Telephone Comany Revisions to Tariff F.C.C. No. 128	Transmittal Nos. 1429 and 1433

ORDER

Adopted: January 2, 1990; Released: January 3, 1990

By the Deputy Chief, Common Carrier Bureau:

1. By the captioned transmittals, the Ameritech Operating Companies (Ameritech), Nevada Bell Telephone Company (Nevada), and Pacific Bell Telephone Company (Pacific) propose individual case basis (ICB) rates and charges for DS3 and DS3-equivalent services. The proposed tariff revisions are scheduled to become effective between January 4, 1990, and January 25, 1990.

2. In a recent Order in CC Docket No. 88-136, the Commission concluded that these carriers, among others, had failed to demonstrate that the ICB rates that they had filed for DS3 and DS3-equivalent services are lawful under Section 202(a) of the Communications Act, 47 U.S.C. §202(a).[1] With a few limited exceptions, which are not relevant here, the Commission therefore directed the carriers to remove these rates from their tariffs and to file general rates for DS3 and DS3-equivalent services.

3. The captioned transmittals propose ICB rates for DS3 and DS3-equivalent services that cannot be distinguished from the rates that the Commission found to be unlawful in the *ICB Order*. We therefore conclude that these rates are unlawful and reject the captioned transmittals.

4. Accordingly, IT IS ORDERED that Ameritech Operating Companies, Transmittal Nos. 376, 377, 378, 379, 381, 382, 383, 386, 387, 389, and 390, Nevada Bell Telephone Company, Transmittal No. 90, and Pacific Bell Telephone Company, Transmittal Nos. 1429 and 1433 ARE REJECTED.

5. IT IS FURTHER ORDERED that the Ameritech Operating Companies, Nevada Bell Telephone Company, and Pacific Bell Telephone Company SHALL ISSUE revisions to their tariffs no later than five business days from the release of this Order removing the rejected material. These revisions shall be scheduled to become effective on not less than one day's notice.

6. IT IS FURTHER ORDERED that Special Permission No. 90-3 IS ASSIGNED and Sections 61.58 and 61.59 of the Commission's Rules, 47 C.F.R. §§61.58, 61.59, ARE WAIVED for the purpose of issuing the above revisions.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief, Common Carrier Bureau

FOOTNOTE

[1] Local Exchange Carriers' Individual Case Basis DS3 Service Offerings, CC Docket No. 88-136, FCC 89-339, released Dec. 18, 1989 (*ICB Order*).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-526

In re Applications of

WILLIAM M. PINER — File No. BPH-860604ML

RO NITA BERNICE HAWES-SAUNDERS — File No. BPH-860606MI

For Construction Permit for a new FM Station on Channel 221A in West Carrollton, Ohio

ORDER

Adopted: January 8, 1990; Released: January 22, 1990

By the Commission: Commissioner Marshall not participating.

1. The Commission has under consideration a Review Board Decision, *William M. Piner*, 4 FCC Rcd 5100 (Rev. Bd. 1989); an Application for Review filed July 27, 1989 by William M. Piner, an Opposition filed August 4, 1989 by Ro Nita Bernice Hawes-Saunders and a Reply filed August 15, 1989 by Piner;[1] a Contingent Application for Review filed July 27, 1989 by Hawes-Saunders and a Response filed August 10 by Piner; and a Motion for Expedited Consideration filed August 4, 1989 by Hawes-Saunders and an Opposition and Motion to Strike filed August 11, 1989 by Piner.

2. Piner's Application for Review is denied. It has, however, raised matters meriting further comment. Piner argues that the Board erred in finding that Hawes-Saunders' credit for integration is enhanced based on female ownership and her superior community activities. It asserts that the gender preference is unconstitutional and that the Congressional mandate prohibiting the Commission from modifying the gender preference has expired. It also argues that Hawes-Saunders' credit for community activities should be reduced because many of those activities are employment related.

3. Piner's arguments are without merit.[2] In House Joint Resolution 395, *Making Further Continuing Appropriations for Fiscal Year 1988 and Other Purposes*, Pub. L. No. 100-202 (1987), Congress prohibited the Commission from modifying its female and minority preferences. That prohibition against modifying the minority and female enhancement preferences has been extended for succeeding fiscal years. *See Departments of Commerce, Justice, State, the Judiciary and Related Agencies Appropriations Act, FY 1990*, Pub. L. No. 101-162, signed November 21, 1989. Moreover, the record establishes that Hawes-Saunders has substantial non-work related civic activities. *See William M. Piner*, 3 FCC Rcd at 7102-03 ¶¶ 22, 25 and 26. Those activities are both more extensive and more recent in time than Piner's civic activities.

4. ACCORDINGLY, IT IS ORDERED, That pursuant to 47 U.S.C. § 5(c) and 47 C.F.R. § 1.115(g), the Application for Review filed July 27, 1989 by William M. Piner IS DENIED.

5. IT IS FURTHER ORDERED, That the Contingent Application for Review filed July 27, 1989 by Ro Nita Bernice Hawes-Saunders IS DISMISSED as moot.

6. IT IS FURTHER ORDERED, That the Motion for Expedited Consideration filed August 4, 1989 by Ro Nita Bernice Hawes-Saunders and the Opposition and Motion to Strike filed August 11, 1989 by William M. Piner ARE DISMISSED as moot.

7. IT IS FURTHER ORDERED, That pursuant to 47 C.F.R. § 1.115(f) the Reply to Opposition to Application for Review filed August 15, 1989 by William M. Piner IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Piner's Reply will be dismissed as an unauthorized pleading. *See Adjudicatory Re-regulation Proposals*, 58 FCC 2d 865, 876 (1976); 47 C.F.R. § 1.115(f).

[2] Piner argues that in *Steele v. FCC*, 770 F. 2d 1192 (D.C. Cir. 1985), the Court invalidated the Commission's female preference policy. As noted by the Review Board, 4 FCC Rcd at 5100 ¶ 4, *Steele* has been vacated by the Court *en banc*. *Order*, No. 84-1176 (D.C. Cir. Oct. 31, 1985).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-460

In the Matter of

Amendment of Section 73.202(b),	RM-6263
Table of Allotments,	RM-6214
FM Broadcast Stations.	RM-6338
(Bartow, Chauncey, Dublin, Eastman,	RM-6601
Jeffersonville, Lyons, Soperton	
and Unadilla, Georgia)	

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: December 29, 1989; Released: January 22, 1990

By the Chief, Allocations Branch:

1. The Commission has before it a petition for reconsideration and request for stay filed by Thompson Radiobroadcasting Company, Inc. ("Thompson"), of the portion of the *Report and Order*, 4 FCC Rcd 6876 (1989), which substituted Channel 265A for Channel 223A at Lyons, Georgia, and modified Thompson's construction permit for Station WLYU(FM) accordingly, without requiring the benefiting party to reimburse Thompson for the costs associated with the change in frequency.

2. On December 14, 1989, Thompson filed a request for withdrawal of his petition for reconsideration. As requested, we shall dismiss the petition for reconsideration.

3. Acordingly, the petition for reconsideration filed by Thompson IS DISMISSED. Further, the request for stay IS DISMISSED AS MOOT.

4 For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

ARCH CAPITOL DISTRICT, INC. File No. 21058-CD-P/ML-1-87

For authority to construct additional facilities for Station KDS296 to operate on frequency 454.450 MHz in the Public Land Mobile Service at Pattersonville, New York

MEMORANDUM OPINION AND ORDER

Adopted: January 12, 1990; Released: January 22, 1990

By the Chief, Mobile Services Division:

1. On December 1, 1986, Airphone Company, Inc. (Airphone) filed the captioned application requesting authority to construct an additional two-way facility to operate on frequency 454.450 MHz at Pattersonville, New York.[1] Henry M. Zachs (Zachs) filed a petition to deny the captioned application.[2] Responsive pleadings were filed.[3]

I. BACKGROUND AND CONTENTIONS

2. In its petition, Zachs alleges that Airphone, in response to Item 18 of Form 401, Schedule A, fails to disclose an existing contractual interest in two-way facilities in the Pattersonville-Schenectady-Albany area. Zachs points out that by Public Notice dated November 12, 1986, the Commission announced that it had accepted for filing applications filed by Airphone to assign the license of Station KDS296, the subject station herein, as well as a number of other stations to Arch Connecticut Valley (Arch Connecticut). Thus, according to Zachs, at the time the subject application was filed, Airphone was, by contract, a "prospective affiliate" of Arch Connecticut.[4] Therefore, Zachs contends, upon the consummation of the assignment to Arch Connecticut, Airphone will be required to amend its applications to include the traffic loading studies for the other two-way facilities in the area controlled by Arch Connecticut pursuant to Sections 22.16(a) and 22.516(a)(2) of the Commission's Rules.[5] In this regard, Zachs notes that on September 5, 1986, Arch Capitol District, Inc. (Arch Capitol), a subsidiary of the parent company of Arch Connecticut,[6] became the licensee of numerous two-way facilities in the Pattersonville-Schenectady-Albany area.[7] Citing *Lehigh Valley Mobile Telephone Company*, Mimeo 0248, (Com. Car. Bur., released October 16, 1985), Zachs argues that in light of the proposed assignment of Station KDS296 license to Arch Connecticut, which was filed before the instant application was filed, and in view of the other two-way frequencies in the Pattersonville area which Arch Connecticut may control, the Commission should defer acting on the captioned application until Arch Connecticut consummates its acquisition of the Airphone facilities and submits the necessary traffic loading studies.

3. In opposition, Airphone argues that while a literal reading of Item 18 of Form 401 requires that it disclose all facilities within 40 miles of the proposed facility in which it has an ownership or controlling interest, by contract or otherwise, it is unclear whether Item 18 requires Airphone, as a prospective assignor, to disclose all facilities and pending applications owned or controlled by Arch Connecticut, the proposed assignee. In any event, Airphone states that the omission of this information was completely inadvertent. Therefore, concurrent with the filing of its opposition, Airphone filed an amendment to its captioned application providing a list of the Part 22 facilities held by Arch Connecticut and Arch Capitol.[8] As to Zachs' contention that the Comission should defer acting on the captioned application until the Airphone/Arch Connecticut assignment is consummated, Airphone maintains that it is a well established Commission policy that routine processing of pending applications is not delayed due to outstanding assignment agreements. Finally, in response to Zachs' contention that both it and Arch Connecticut should be required to submit the necessary traffic loading studies, Airphone points out that Arch Connecticut is not the applicant, and that in any event, the Commission's rules do not require that pending applications be amended to supply necessary traffic loading studies to reflect future assignments. Airphone asserts that since the Airphone/Arch Connecticut assignment has not been consummated, Zachs' arguments should be rejected.

4. On March 26, 1987, Arch Connecticut notified the Commission that the assignment of Airphone's facilities to Arch Connecticut was consummated on March 2, 1987, and it amended the captioned application to reflect the assignment. In a letter dated April 1, 1987, Arch Connecticut states that at the time it acquired Airphone, it held no interest in any Part 22 authorizations other than those acquired from Airphone. Arch Connecticut asserts that, even though its affiliate, Arch Capitol, holds authorizations for several 454 MHz facilities in the Pattersonville area, since the captioned application simply proposed to add a new location to a previously authorized frequency, no traffic loading study is required. However, in an effort to resolve the dispute with Zachs, Arch Connecticut indicates that Arch Capitol proposes to relinquish one of its authorized frequencies, 454.300 MHz in the Pattersonville area, and prosecute the subject application herein in its own name. Accordingly, on May 13, 1988, Arch Connecticut amended the captioned application to substitute its affiliate, Arch Capitol, as the applicant. Arch Capitol in turn proposed to amend the captioned application by relinquishing its authority to operate on frequency 454.300 MHz on call sign KPD955 at Albany, Helderberg Mountain, and Pattersonville, New York contingent upon the grant of the captioned application. This proposal, Arch Capitol maintains, would convert this filing into an application for authority to switch frequencies at Pattersonville from 454.300 MHz to 454.450 MHz and surrender the licenses for 454.300 MHz at Albany and Helderberg Mountain.[9] Arch Capitol maintains that since the exchange of frequencies proposed is consistent with Commission practices, involves no change

of ownership pursuant to Section 22.23 of the Commission's Rules, and would leave the Arch companies with the same number of frequencies that they presently control, it is not necessary to submit traffic loading studies.

5. In opposition to Arch Connecticut's May 13, 1988 amendment, Zachs reasserts its view that Arch was required to demonstrate adequate loading on its existing channels in order to justify the grant of the additional 454.450 MHz channel. According to Zachs, Arch Connecticut's failure to submit the loading studies, particularly upon the consummation of the Airphone/Arch assignment, renders the application blatantly defective. Moreover, citing *Communications Specialists Co., Inc.*, DA 86-48 (Com. Car. Bur., released October 10, 1986), Zachs argues that a late-filed loading study cannot cure the defective application resulting from Arch Connecticut's failure to submit the necessary loading studies with the original appliction. In any event, Zachs contends that Arch Capitol's representation that an existing two-way facility will be discontinued when the proposed additional channel becomes operational in no way obviates the need to submit the loading studies required under the Commission's rules, citing *C. L. Slocum*, FCC Mimeo 3046 (Com. Car. Bur., released March 11, 1985). In view of the above, Zachs concludes that the May 13, 1988 amendment to the Arch Capitol application must be denied and the captioned application should be dismissed.

II. DISCUSSION

6. We reject Zachs' claim that Airphone, as the initial applicant, was required to file traffic loading studies. Applicants are required to include traffic loading studies where (1) they request one or more frequencies for a new two-way facility or (2) they request one or more additional frequencies for an existing two-way station. 47 C.F.R. Sections 22.16 and 22.516(a)(2). Airphone's initial application proposed to add a new location to a station using a previously authorized frequency. Therefore, no loading studies were required.

7. Initially we note that where, as here, an assignment is pending, if it is necessary to provide traffic loading studies based upon the facilities owned by the assignee, the assignee is required to provide such studies only within 30 days of consummation of the assignment.[10] *See Lehigh Valley Mobile Telephone Company*, 2 FCC Rcd 88 (1987).[11] In any event, given that the Airphone/Arch Connecticut assignment was consummated prior to our acting on the captioned application, Zachs' request that we defer acting on the application and require the submission of traffic loading studies pending the consummation of the assignment is now moot.

8. Moreover, we do not believe that it is necessary in this case to decide whether Arch Connecticut, as an affiliate of Arch Capitol, was required to submit traffic loading studies upon the consummation of the assignment. In this regard, Arch Connecticut, having consummated the assignment on March 2, 1987, notified the Commission on April 1, 1987, that it was prepared to resolve the dispute with Zachs by proposing that Arch Capitol relinquish its authority to operate on frequency 454.300 MHz in exchange for substituting itself as the applicant herein. On May 13, 1988, Arch Connecticut amended its application to substitute Arch Capitol as the applicant. Arch Capitol in turn proposed to amend its application to relinquish its authority to operate on frequency 454.300 MHz provided that it received authorization to operate on frequency 454.450 MHz at Pattersonville, New York. Since Arch Capitol is requesting to exchange a frequency on which it already operates for a new frequency, no traffic loading studies are required. *See Mobile Radio Telephone and Paging Service, Inc.*, Mimeo 4451 (Mob. Serv. Div., May 10, 1985), and *Tel - Page, Inc.*, Mimeo 2435 (Mob. Serv. Div., released February 8, 1985).[12]

9. Based on the above, we further find Arch Capitol to be legally technically and otherwise qualified to be a Commission licensee and that a grant of Arch Capitol's application would serve the public interest.

10. Accordingly, IT IS ORDERED, That the application filed by Arch Capitol District to serve Pattersonville, New York (File No. 21058-CD-P/L-1-87) IS GRANTED.

11. IT IS FURTHER ORDERED That the petition to deny filed by Henry M. Zachs IS DENIED.

12. This order is issued under Section 0.291 of the Commission's Rules and is effective on its release date.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTES

[1] At the time it filed its application, Airphone held authorizations to operate on frequency 454.450 MHz at several locations in the states of Connecticut, Massachusetts and New Hampshire.

[2] Zachs is the licensee of several radio common carrier stations serving the Albany-Schenectady-Troy, New York area, including Station KNKB726 which is authorized to operate on frequency 454.05 MHz at Schenectady.

[3] The parties have filed several supplemental pleadings pursuant to Section 1.45(c) of the Commission's Rules. Section 1.45 states in pertinent part that additional pleadings may be filed only if authorized by the Commission. Because of the nature of the proceedings and the arguments involved, we will accept the additional pleadings filed by the parties.

[4] By Public Notice dated December 24, 1986, the Commission announced that it had granted its consent to the proposed assignment.

[5] Sections 22.16 and 22.516 of the Commission's Rules provide in pertinent part that traffic load studies are required for applications which request one or more additional frequencies for an existing two-way station.

[6] Arch Connecticut and Arch Capitol are wholly-owned subsidiaries of the Arch Mobile Intermediate Corporation, which in turn is a subsidiary of Arch Mobile Communications, Inc.

[7] Zachs refers to a letter dated September 16, 1986, informing the Commission of the consummation of the assignment to Arch Capitol of various licenses for two-way facilities in the Pattersonville-Schenectady-Albany area formerly licensed to Hudson-Mohawk Telephone Company, Inc. and Capital Telephone Co., Inc.

[8] In its amendment dated January 27,1987, Airphone indicates that as of that date the assignment of the above-referenced facilities to Arch Connecticut had not yet been consummated.

[9] The proposal would also require the designation of Arch Capitol's control point (611 Union Street, Schenectady, New York) and would involve a change in call signs from KDS296 to KPD955.

[10] Pursuant to Section 1.65 of the Commission's Rules, applicants are required to amend their applications within 30 days to reflect "a substantial change as to any other matter which may be of decisonal significance . . . ."

[11] Zachs' reliance on *Lehigh Valley Mobile Telephone Company*, Mimeo 0248, (Com. Car. Bur., released October 16, 1985), is misplaced. Contrary to Zachs' argument, the Common Carrier Bureau, in that case, also required the approved assignee to submit a traffic loading study for a pending Part 22 construction authorization within 30 days of the consummation of the assignment.

[12] Zach cites *Communication Specialists Co., Inc.* and *C. L. Slocum* for the proposition that the failure to comply with the loading requirements constitutes a fatal defect regardless of whether the applicant later proposes to cure the defect. However, *Communication Specialists Co.*, Inc., and C.L. Slocum are inapposite because in both cases the Mobile Services Division initially dismissed the applicants' applications as defective for having failed to provide the traffic loading studies and the applicants were seeking to have their applications reinstated. Here, although the captioned application was initially filed as a request for an additional frequency, Arch Capitol amended the application to substitute frequency 454.450 MHz for the previously authorized frequency 454.300 MHz prior to Commission processing of the application.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matters of

US SPRINT COMMUNICATIONS
COMPANY LIMITED PARTNERSHIP,
Complainant,

v. File Nos. E-89-251
through E-89-272

THE BELL TELEPHONE COMPANY
OF PENNSYLVANIA, et al.,
Defendants.

ORDER

Adopted: January 12, 1990; Released: January 22, 1990

By the Chief, Enforcement Division, Common Carrier Bureau:

1. In its Consolidated Reply and Opposition, filed August 15, 1989, the complainant in the above-captioned proceedings requested that the Common Carrier Bureau (Bureau) stay these proceedings pending the resolution of the Commission's related tariff investigation in CC Docket No. 85-166, which involves the same basic issues that underlie these complaints. *See Investigation of Special Access Tariffs of Local Exchange Carriers*, Memorandum Opinion and Order, CC Docket No. 85-166, Phase I, FCC 86-52 (released Jan. 24, 1986), *rev'd sub nom. MCI Telecommunications Corp. v. FCC*, 842 F.2d 1296 (D.C. Cir. 1988). Subsequent to the filing of the complainant's Consolidated Reply, the Bureau issued an order that held in abeyance a set of proceedings that, like these, also involves Shared Network Facilities Agreements (SNFAs). *See MCI Telecommunications Corp. v. Bell Tel. Co. of Pa.*, 4 FCC Rcd 8227 (Com. Car. Bur. 1989) (MCI Order).

2. In response to the complainant's request, we now direct that the above-captioned proceedings be held in abeyance until such future date as will be determined by the Bureau. As stated in the MCI Order, we are cognizant that our present decision conflicts with an earlier Bureau determination that deferring action on SNFA complaints was precluded by the time constraints imposed by the Federal Communications Commission Authorization Act of 1988 (FCCAA), Pub. L. No. 100-594, 102 STAT. 3021 (Nov. 3, 1988). *See Illinois Bell Tel. Co. v. AT&T*, 4 FCC Rcd 2690 (Com. Car. Bur. 1989). In the MCI Order, however, we re-interpreted the application of the FCCAA to those proceedings based on our conclusion that the time constraints imposed thereby did not mechanically apply in that set of cases. Consistent with the MCI Order, we also hold the above-captioned proceedings in abeyance. We intend to resume action on these complaints immediately following resolution of the tariff investigation in CC Docket No. 85-166.

3. Accordingly, IT IS ORDERED, pursuant to authority delegated in Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the above-captioned proceedings be held in abeyance pending further Commission action.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Hess
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matters of

RCI CORPORATION,
Complainant,

v. File Nos. E-89-318
through E-89-339

THE BELL TELEPHONE COMPANY
OF PENNSYLVANIA, et al.,
Defendants.

ORDER

Adopted: January 12, 1990; Released: January 22, 1990

By the Chief, Enforcement Division, Common Carrier Bureau:

1. In its Consolidated Reply and Opposition, filed October 17, 1989, the complainant in the above-captioned proceedings requested that the Common Carrier Bureau (Bureau) stay these proceedings pending the resolution of the Commission's related tariff investigation in CC Docket No. 85-166, which involves the same basic issues that underlie these complaints.[1] *See Investigation of Special Access Tariffs of Local Exchange Carriers*, Memorandum Opinion and Order, CC Docket No. 85-166, Phase I, FCC 86-52 (released Jan. 24, 1986), *rev'd sub nom. MCI Telecommunications Corp. v. FCC*, 842 F.2d 1296 (D.C. Cir. 1988). Subsequent to the filing of the complainant's Consolidated Reply, the Bureau issued an order that held in abeyance a set of proceedings that, like these, also involves Shared Network Facilities Agreements (SNFAs). *See MCI Telecommunications Corp. v. Bell Tel. Co. of Pa.*, 4 FCC Rcd 8227 (Com. Car. Bur. 1989) (MCI Order).

2. In response to the complainant's request, we now direct that the above-captioned proceedings be held in abeyance until such future date as will be determined by the Bureau. As stated in the MCI Order, we are cognizant that our present decision conflicts with an earlier Bureau determination that deferring action on SNFA complaints was precluded by the time constraints imposed by the Federal Communications Commission Authorization Act of 1988 (FCCAA), Pub. L. No. 100-594, 102 STAT. 3021 (Nov. 3, 1988). *See Illinois Bell Tel. Co. v. AT&T*, 4 FCC Rcd 2690 (Com. Car. Bur. 1989). In the MCI Order, however, we re-interpreted the application of the FCCAA to those proceedings based on our conclusion that the time constraints imposed thereby did not mechanically apply in that set of cases. Consistent with the MCI Order, we also hold the above-captioned proceedings in abeyance. We intend to resume action on these complaints immediately following resolution of the tariff investigation in CC Docket No. 85-166.

3. Accordingly, IT IS ORDERED, pursuant to authority delegated in Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the above-captioned proceedings be held in abeyance pending further Commission action.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Hess
Chief, Enforcement Division
Common Carrier Bureau

FOOTNOTE

[1] The complainant has recently renewed this request via a letter to Mary Beth Hess, Chief, Enforcement Division, dated January 8, 1990.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TOTAL TEL USA,
Complainant,

v. File No. E-89-359

NEW JERSEY BELL TELEPHONE
COMPANY,
Defendant.

ORDER

Adopted: January 12, 1990; Released: January 22, 1990

By the Chief, Enforcement Division, Common Carrier Bureau:

1. In its Complaint, filed September 25, 1989, the complainant in the above-captioned proceeding requested that the Common Carrier Bureau (Bureau) stay this proceeding pending the resolution of the Commission's related tariff investigation in CC Docket No. 85-166, which involves the same basic issues that underlie this Complaint. *See Investigation of Special Access Tariffs of Local Exchange Carriers*, Memorandum Opinion and Order, CC Docket No. 85-166, Phase I, FCC 86-52 (released Jan. 24, 1986), *rev'd sub nom. MCI Telecommunications Corp. v. FCC*, 842 F.2d 1296 (D.C. Cir. 1988). Subsequent to the filing of the Complaint, the Bureau issued an order that held in abeyance a set of proceedings that, like this one, also involves Shared Network Facilities Agreements (SNFAs). *See MCI Telecommunications Corp.* v. *Bell Tel. Co. of Pa.*, 4 FCC Rcd 8227 (Com. Car. Bur. 1989) (MCI Order).

2. In response to the complainant's request, we now direct that the above-captioned proceeding be held in abeyance until such future date as will be determined by the Bureau. As stated in the MCI Order, we are cognizant that our present decision conflicts with an earlier Bureau determination that deferring action on SNFA complaints was precluded by the time constraints imposed by the Federal Communications Commission Authorization Act of 1988 (FCCAA), Pub. L. No. 100-594, 102 STAT. 3021 (Nov. 3, 1988). *See Illinois Bell Tel. Co. v. AT&T*, 4 FCC Rcd 2690 (Com. Car. Bur. 1989). In the MCI Order, however, we re-interpreted the application of the FCCAA to those proceedings based on our conclusion that the time constraints imposed thereby did not mechanically apply in that set of cases. Consistent with the MCI Order, we also hold the above-captioned proceeding in abeyance. We intend to resume action on this Complaint immediately following resolution of the tariff investigation in CC Docket No. 85-166.

3. Accordingly, IT IS ORDERED, pursuant to authority delegated in Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the above-captioned proceeding be held in abeyance pending further Commission action.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Hess
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

COASTAL EXPRESS
COMMUNICATIONS, INC.

For Permit and License in the Public
Mobile Radio Service for:

Two-way facility to operate on frequency 454.650 MHz at Pensacola, Florida	File No. 24842-CD-P/L-01-86
One-way facility to operate on frequency 35.60 MHz at Pensacola, Florida	File No. 24843-CD-P/L-01-86
One-way facility to operate on frequency 35.60 MHz at Ft. Walton Beach, Florida	File No. 25063-CD-P/L-01-86

MEMORANDUM OPINION AND ORDER

Adopted: January 12, 1990; Released: January 22, 1990

By the Chief, Mobile Services Division:

1. Coastal Express Communications, Inc. ("Coastal") filed the captioned applications seeking authority to construct one-way paging facilities on frequency 35.60 MHz at Pensacola, Florida and Ft. Walton Beach, Florida, and two-way facilities on frequency 454.650 MHz at Pensacola, Florida.[1] American Mobilphone Paging, Inc. ("AMP"), a licensee in the Public Land Mobile Service ("PLMS") providing both one-way paging and two-way mobile telephone service in the Pensacola area and authorized to provide two-way mobile service in the Ft. Walton area, has filed a "Petition to Deny or Designate for Hearing" against the two captioned Pensacola applications ("Petition").[2] Coastal filed an opposition to the Petition, and AMP filed a reply.

2. In its captioned applications, Coastal disclosed: that it was wholly-owned by Michael D. Bowman ("Bowman"); that Bowman was the Executive Vice President and a key employee of American Mobilphone, Inc. ("American"), which is licensed to provide public mobile telephone service in various cities throughout the Southeastern United States; that American had a 40-percent, non-controlling ownership interest in AMP, [3] and that American had contracted to sell its 40-percent interest in AMP to one of the other existing AMP stockholders (Bernard Dittman) contingent upon FCC approval.

I. CONTENTIONS OF THE PARTIES

A. *AMP's Petition*

3. In its Petition to Deny, AMP argues that Coastal is not the real party in interest behind its Pensacola applications but, rather, is a "front" for American. AMP states that American is under two legal disabilities which prevent it from directly filing applications in Pensacola, namely: (1) American is bound by a covenant it entered into with AMP's predecessor-in-interest not to compete in the Pensacola market,[4] and (2) since American is a 40-percent owner of AMP, it must, pursuant to Section 22.16 of the Commission's Rules,[5] demonstrate enough traffic on AMP's channels to warrant an additional two-way channel before its own two-way 454.650 MHz frequency application can be granted. According to AMP, American could not make this showing based on AMP's current loading. These two legal disabilities, AMP argues, provide a powerful motive for American to use Coastal as a "front" to file its applications.

4. To buttress its allegation that American is the real party in interest behind Coastal's applications, AMP points out that Coastal's address and telephone number are the same as American's; that Coastal's engineering exhibits were prepared by Steve Cannon who is American's Comptroller; and that at the same time that Coastal filed its own 35.60 MHz applications, American was filing various 35.60 MHz applications for various locations in Alabama and North Carolina, suggesting that Coastal and American are coordinating the filing of applications. Consequently, AMP requests that Coastal's captioned Pensacola applications be denied or, alternatively, that they be designated for hearing to determine whether American is the real party in interest behind Coastal's application.

B. *Coastal's Opposition*

5. In its opposition, Coastal argues first that it has fully complied with the disclosure requirements of Section 22.13(a)(1) of the Commission's Rules by disclosing that Bowman was Coastal's sole principal, that Bowman was Vice President of American, and that American had a 40-percent interest in AMP. Coastal further states that Bowman is the real party in interest behind the Coastal applications and that Bowman provided all funding for Coastal out of his personal assets. Next, Coastal argues that there is nothing in the Commission's Rules that would preclude American from filing PLMS applications in Pensacola in its own name nor is American under any contractual disability from filing such applications. Coastal concedes that in January 1984, American did enter into an agreement with AMP's predecessor-in-interest whereby American agreed not to establish its own paging or two-way operations in Pensacola. However, Coastal notes, American was advised by its counsel that this non-compete agreement was most likely unenforceable under state law and that in any event, the "waiver clause" contained in American's offer to sell its 40-percent interest in AMP to Dittman[6] would bar enforcement of the non-compete agreement after the sale took place.[7] Thus, Coastal argues, that at the time that Coastal filed its applications, American was under no disability to file applications in its own name and, that, therefore, American lacked a motive to deceive the Commission by filing applications in Coastal's name. Coastal adds that American had a corporate policy of permitting employees, such as Bowman, to pursue outside business interests, including owning separate

PLMS businesses in geographic areas not serviced by American.[8] Coastal adds that at the September 5, 1986 closing, AMP released American from the non-compete agreement and also released American from any and all claims AMP had against American. Thus, Coastal asserts, had American filed PLMS applications in the Summer of 1986 for stations in AMP's territory, American would have been free to prosecute them in its own name without risking that a lawsuit would be filed by AMP.[9]

C. *AMP's Reply*

6. In its reply AMP concedes that the non-compete covenant between AMP and American was extinguished on September 5, 1986, but claims that American is still at a legal disability preventing it from filing applications in the Pensacola and Ft. Walton markets because there exists a second contractual non-compete clause among Dittman, Stiegler, AMP, and American. In support, AMP has attached a copy of an agreement between these parties, containing a non-compete clause, dated January 21, 1984.

II. DISCUSSION

7. Upon careful review of the arguments presented, we deny AMP's Petition. Initially we note that that AMP's arguments and assertions are similar to those it earlier raised against Coastal's Mobile, Alabama application, and which were considered and rejected in *Coastal Express, supra*. However, in view of the fact that there are some significant differences in the facts and allegations in *Coastal Express* and the case herein, we proceed to an analysis of AMP's allegations.

8. Pursuant to Section 22.13(a) of the Rules, "Each application for a radio station authorization . . . shall . . . [d]isclose fully the real party or parties in interest, that are engaged in the Public Mobile Services . . . ." As we noted in *W. P. Scamardo dba Hearne Mobilfone*, Mimeo No. 6570, at para. 4 n.6 (Mob. Serv. Div., released Aug. 27, 1986) (" *Hearne* "): "This Section calls for the disclosure of all relevant real party in interest information, 'including' records of any ownership interests in the given proposal. The disclosure requirement is not limited to ownership information . . . ." We have also stated that the test for determining whether a third party is a real party in interest behind an application is whether "that person has an ownership interest, or is or will be in a position to control the station." *See id., citing Sumiton Broadcasting Company, Inc.*, 15 FCC 2d 400, 405 (1968). Moreover, we noted in *Hearne* several factors that may be considered in making a determination of whether a third party is in a position to actually or potentially control the applicant. While several of the factors indicating such control are present in the instant applications, we find that the most significant criterion of real party status is not present. That factor is "a motive for deception." *See Cannon's Point Broadcasting Co.*, 93 FCC 2d 643, 655 (1983); *Hearne, slip op.* at para. 6.

9. As we noted in *Hearne*, "such a motive may be present where licensees are precluded from filing for additional frequencies due to a multiple ownership limitation rule." *Id.* In the *First Report and Order in General Docket No. 80 - 183*, 80 FCC 2d 1337, 1353 (1982) (*Order*), the Commission "limited paging applicants to one frequency per *initial* authorization and required existing operators applying for additional frequencies to submit traffic loading studies to support their applications."[10] However, Section 22.16 was amended to eliminate loading studies for a single additional one-way channel in a geographic area in 1984 whereby applicants who filed applications for such a channel after January 1, 1986 are not required to show traffic loading on their existing systems.[11] Therefore, since the captioned 35.60 MHz applications are for one-way paging facilities and were filed after January 1, 1986, American could have filed in its own name for the captioned one-way facilities without filing a loading study. Thus, American would have had no motive to conceal its own identity in order to avoid the filing of loading studies with reference to these two one-way applications.[12]

10. However, with respect to applications for two-way facilities, loading studies must still be submitted to justify additional channels on existing two-way systems, pursuant to Section 22.16 of the Rules. AMP, but not American, has licenses for existing two-way frequencies in the Pensacola area. Therefore, if American were found to have a controlling interest in AMP, then American may have had a motive to file its two-way application for Pensacola in Coastal's name to avoid the loading studies requirement. However, there is nothing in the record to warrant a finding that American's 40 percent interest in AMP amounts to a controlling interest. American's 40-percent ownership certainly did not constitute *de jure* control (legal control). Furthermore, AMP does not even allege that the 40-percent ownership constituted American's *de facto* (actual control) over AMP. *See Lorain Journal Company v. FCC*, 351 F.2d 824 (D.C. Cir. 1965). ("[C]ontrol may consist of actual control by virtue of the special circumstances presented.") AMP's argument that American would have been required to submit loading studies for the captioned application for two-way facilities in Pensacola, consists solely of its statement that American had a 40-percent ownership of AMP. Therefore, in the absence of any evidence that American had a controlling interest in AMP, we conclude that American would not have been required to submit loading studies for AMP's facilities. Accordingly, we find that American was not motivated to deceive the Commission by the need to circumvent the Commission's loading study requirements.

11. Next, we find that Coastal was not motivated to deceive the Commission by the non-compete clause contained in the January 1984 agreement referenced at note 4, *supra*. First, we note that American's counsel had informed it that the non-compete clause was most likely unenforceable under state law. Moreover, although the sale of stock from American to Dittman, which voided the non-compete clause, did not take place until September 5, 1986, after the captioned applications were filed, Dittman committed himself to buy the stock in April 1986.[13] Thus, when the Court's decision was issued on May 19, 1986, affirming that the non-compete clause would be voided upon American's sale of stock to Dittman, American was aware that the non-compete clause would shortly be repudiated.[14] In these circumstances, we conclude that American had adequate assurance that it could file the captioned applications in its own name on July 23 and August 4, 1986, the dates that Coastal filed the instant applications, had it chosen to do so. Consequently, because we find that American lacked a motive to deceive the Commission, we find that AMP has not supported its argument on the real party in interest issue.

12. Concerning AMP's alternative request that we designate the real party in interest issue for a hearing, parties challenging an application and who seek a hearing must satisfy a two-prong test established in 47 U.S.C. Sec. 309(d)(1) and (2). *See Astroline Communications Company Limited Partnership*, 857 F.2d 1556, 1557 (D.C. Cir. 1988) (" *Astroline* "). The protesting party must present "specific allegations of fact sufficient to show . . . that a grant of the application would be prima facie inconsistent with [the public interest, convenience, and necessity]". 47 U.S.C. Sec. 309(d)(1). The Commission must proceed "on the assumption that the specific facts set forth [in the petition] are true." *Citizens for Jazz on WRVR v. FCC*, 775 F.2d 392, 397 (D.C. Cir 1985). If the Commission determines that the petitioning party satisfies the threshold standard, the inquiry proceeds to a second phase. Having found that such party has alleged a *prima facie* case that grant of the application would be inconsistent with the public interest, the Commission determines whether, "on the basis of the application, the pleadings filed, or other matters which it may officially notice[,] . . . a substantial and material question of fact is presented." 47 U.S.C. Sec. 309(d)(2). *See also Gencom, Inc. v. FCC*, 832 F.2d 171, 181 (D.C. Cir. 1987). If the Commission concludes that such a question of fact has been raised, or if it cannot, for any reason, find that grant of the application would be consistent with the public interest, it must conduct a hearing in accordance with 47 U.S.C. Section 309(e).

13. In light of the foregoing, we conclude that there is no need to grant AMP's hearing request. Even assuming *arguendo* that AMP has established a *prima facie* case that American is the undisclosed real party in interest behind the captioned applications, and that, therefore, grant of the captioned applications would be inconsistent with the public interest, we conclude that AMP has not satisfied the second prong of the *Astroline* test, because a substantial and material question of fact has not been presented. Contrary to AMP's assertions, the evidence of record demonstrates that American was not under any legal or contractual disabilities which prevented it from filing applications in its own name. While the evidence is undisputed that Coastal's and American's address and telephone number are the same, and that Coastal's engineering exhibits were prepared by American's Comptroller, these factors, by themselves, do not raise a substantial and material question of fact that American is the real party in interest behind Coastal's applications, particularly when we can discern no motive for American to use Coastal as a "front" to file its applications. *See Hearne, slip op.* at para. 6. Consequently, we find that AMP has not sufficiently raised a substantial and material factual question concerning a real party in interest behind Coastal's applications. Moreover, we find that the captioned applications are in all other respects in conformance with our Rules.

III. ORDERING PARAGRAPHS

14. Accordingly, IT IS ORDERED that that the Petition to Deny or Designate for Hearing filed by American Mobilphone Paging, Inc. IS DENIED.

15. IT IS FURTHER ORDERED that the applications of Coastal Express Communications, Inc., File Nos. 24842-CD-P/L-01-86, 24843-CD-P/L-01-86, and 25063-CD-P/L-01-86, ARE HEREBY GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTES

[1] The two captioned Pensacola applications, File Nos. 24842-CD-P/L-01-86 and 24843-CD-P/L-01-86, were filed on July 23, 1986. *See* Public Notice, Rpt. No. PMS-86-46 (released Aug. 6, 1986). The captioned Ft. Walton Beach application, File No. 25063-CD-P/L-01-86, was filed August 4, 1986. *See* Public Notice, Rpt. No. PMS-86-47, Mimeo No. 6301 (released Aug. 13, 1986).

[2] No petition to deny was filed against the captioned Ft. Walton Beach application. During the pleading cycle of the two captioned Pensacola applications, however, AMP filed a "Petition to Consolidate Applications," requesting that the Ft. Walton Beach application, the captioned Pensacola applications, and five other then-pending Coastal applications be consolidated into one proceeding, on the grounds that all these applications raised similar real party in interest questions. In Coastal Express Communications, Inc., 3 FCC Rcd 1626 (Mob. Serv. Div. 1988) (*"Coastal Express"*), the Mobile Services Division granted Application File No. 24346-CD-P/L-1-86 (for a one-way station to operate on 35.60 MHz at Mobile, Alabama), and declined to consolidate the other pending Coastal applications into that proceeding. Subsequently, Coastal dismissed its other pending applications, except for the Pensacola and Ft. Walton Beach applications, which we have addressed in this order.

[3] The evidence of record shows that the remaining 60 percent was owned and controlled as follows: Bernard Dittman owned 40 percent, and Rene Steigler, AMP's Vice President, owned 20 percent.

[4] The non-compete clause was contained in an agreement dated January 21, 1984, among Steigler, Dittman, CallPage, Inc. (which was AMP's predecessor-in-interest), American, and W. Chris Blane (who was then American's Vice-President). Paragraph 11.A. of that agreement stated in pertinent part that as long as American, Dittman, Blane, and Steigler were stockholders in CallPage and for a period of two years thereafter, none of them was permitted to enter into competition with CallPage within a 50-mile radius of any location from which CallPage operated mobile radio and/or paging services or acted as a radio common carrier.

[5] Section 22.16 provides requirements for additional channels on existing and new systems.

[6] American offered to sell its 40-percent interest in AMP to Dittman by letter dated March 21, 1986. Paragraph 5 of that letter states: "At the closing of the [sale], the buyer shall waive or terminate and shall cause AMP[] to waive or terminate any agreement or covenant not to compete with AMP[] to which the seller may be subject or bound."

[7] Coastal states that on April 18, 1986, Dittman elected to purchase American's AMP stock but attempted to avoid application of the waiver clause. American obtained a declaratory order from a state court that Dittman could not elect to purchase the stock without also binding himself to comply with the waiver clause, thereby terminating the non-compete clause. Coastal attached a copy of this order, American Mobilphone, Inc. v. American Mobilphone Paging, Inc., No. CV 86 500-221 JDC (Cir. Ct. Ala. May 19, 1986), to its opposition. The sale of

American's 40-percent interest of AMP to Dittman was consummated on September 5, 1986 and approved by the FCC. Commission approval was necessary because Dittman's newly-acquired 40-percent interest would increase his ownership in AMP to 80-percent controlling interest.

[8] Coastal noted that Robert Moyer ("Moyer"), the local manager of American's West Virginia operations, had existing or pending PLMS facilities in the southern Florida Gulf Coast area and the Maryland/D.C./Virginia area, all with the consent of American, even though Moyer is a full-time salaried employee of American.

[9] Subsequent to the instant pleading cycle, Coastal, on February 19, 1988, submitted a minor amendment, pursuant to Section 1.65 of the Rules, to its Mobile, Alabama application disclosing that on December 15, 1987, Bowman was promoted to President of American, that he had purchased newly-issued American stock giving him a ten-percent ownership interest in American, and that he is seeking to sell his interest in Coastal but has not found a purchaser.

[10] In the *Order*, the Commission further noted that it would require information about ownership and control in order to deter applicants from circumventing this limit by filing "numerous applications in the same area under different names." *Order* at note 29.

[11] *See Regulatory Policies and Procedures for DPLMRS (Fourth Report and Order)*, 97 FCC 2d 953, 958 (1984).

[12] Moreover, neither American nor AMP had pending applications for additional one-way channels in the Pensacola or Ft. Walton Beach areas at the time the subject applications were filed. Therefore, American would have been entitled to file for an additional one-way channel in those markets in its own name pursuant to Section 22.16(c) of the Commision's Rules, which essentially states that paging channels will be authorized one channel at a time in any given area.

[13] Although Dittman did not recognize American's requirement that Dittman would cause AMP to waive the non-compete clause at the time of the stock transfer, Dittman "still intend[ed] to be the purchaser" regardless of the legality of the non-compete clause. Moreover, although Dittman reserved the right to litigate whether or not the non-compete clause would be binding after the purchase, Dittman's reservation "do[es] not intend to in any way adversely affect [Dittman's] position as purchaser . . . ." Furthermore, Dittman stated that upon the court's decision being finalized, his "reservation shall be ineffective." *See* Letter from Dittman to American (April 18, 1986), a copy of which was appended to Coastal's opposition.

[14] Regarding the second non-compete clause mentioned by AMP, AMP subsequently conceded there was only one non-compete clause. (AMP earlier viewed the existence of two beneficiaries (*i.e.*, AMP and Stiegler) of the January 21, 1984 covenant as creating two non-compete covenants.) *See* AMP Reply to Opposition to Petition for Reconsideration at 2 of *Coastal Express*.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MCI INTERNATIONAL, INC. File No. I-T-C-90-026

Application for authorization under Section 214 of the Communications Act of 1934, as amended, to acquire and operate capacity in the PTAT-1 Cable System for the provision of authorized common carrier service between the United States, on the one hand, and Bermuda and Ireland, on the other hand.

ORDER AND AUTHORIZATION

Adopted: January 12, 1990; Released: January 22, 1990

By the Chief, International Facilities Division:

1. The above-captioned application, filed on November 20, 1989 and supplemented by letter of December 20, 1989 by MCI International, Inc. (MCII), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to acquire and operate capacity in the Private Transatlantic Telecommunications Cable System (PTAT-1) for the provision of authorized common carrier services between the U.S., on the one hand, and Bermuda and Ireland, on the other hand, and beyond. The application was placed on public notice on November 22, 1989. No comments were received.

2. MCII is a non-dominant international carrier currently providing international services to the points reached via the PTAT-1 cable system. MCII is currently authorized to acquire and operate a one-half interest in nine E-1 circuits[1] in the PTAT-1 cable system for service to the United Kingdom, the Republic of Ireland, Bermuda and points beyond.[2] It now proposes to acquire and operate an additional one-half interest in four E-1 circuits in the PTA-1 cable. MCII states that it will be using the capacity in PTAT-1 to supplement existing facilities and not to divert any portion of its traffic from the existing common carrier facilities.

3. The Commission stated in its *Private Submarine Cable Decision* [3] that it would require common carriers wishing to acquire capacity in PTAT-1 to file applications pursuant to Section 214 of the Communications Act.[4] In this context, we find that MCII's application contains all of the information necessary under Section 63.01 of the Commission's Rules.[5] Furthermore, we find that MCII's application does not raise any economic impact issues.[6]

4. Upon consideration of the application, we find that authorization of the facilities requested would serve the public convenience and necessity.

5. Accordingly, IT IS ORDERED that application File No. I-T-C-90-026 IS GRANTED, and MCII is authorized to:

a. acquire on an IRU and/or lease basis, as appropriate, a one-half interest in two E-1 circuits in the PTAT-1 cable including the Bermuda spur and two E-1 circuits in the PTA-1 cable including the Ireland spur;

b. acquire and operate necessary domestic connecting facilities; and

c. utilize said facilities to provide MCII's regularly authorized services between the U.S., on the one hand, and the Republic of Ireland and Bermuda, on the other hand, and beyond.

6. IT IS FURTHER ORDERED that this authorization is issued subject to the terms and conditions of any license issued to PSI herein under the act entitled "An Act relating to the landing and operation of submarine cables in the United States" (47 U.S.C. §§34-39).

7. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] An E-1 circuit is equivalent to a capacity of 2.048 megabits per second (Mbps).

[2] *See* CICI, Inc. *et al* 4 FCC Rcd 6622 (1989) and MCI International, Inc., File No. I-T-C-89-155, DA 89-1525, released December 5, 1989.

[3] Private Submarine Cable Decision, 100 FCC 2d 1033 (1985).

[4] This requirement was restated in the *International Competitive Carrier* decision, where the Commission determined that it would require non-dominant carriers to file applications to acquire capacity from any future private cable sources. International Competitive Carrier Policies, 102 FCC 2d 812, 845 (1985). Information requirements for Section 214 applications are found in Section 63.01 of the Commission's Rules 47 C.F.R. §63.01.

[5] The Commission places no special burdens on any carrier making an application for private cable capacity. *See* Pacific Telecom, Inc., Request for Clarification of Policies Concerning Use of Independent Cables, File No. ISP-89-002, 4 FCC Rcd 4454 (1989).

[6] The Commission stated that it has authority under its public interest mandate under Section 214 to consider *sua sponte* any economic impact issues, including traffic diversion issues, that may be raised in an application by a common carrier to acquire private cable capacity or to consider such issues when raised by

third parties filing comments in response to an application. However, the Commission has stated that it does not anticipate that common carrier acquisition of private cable capacity will normally give rise to such issues. Even if an applicant seeks to acquire a substantial amount of private cable capacity and to offload capacity on a common carrier cable or change a prior commitment for use of capacity in planned common carrier facilities, the Commission stated that the presence of these factors would not be conclusive evidence of economic harm. The Commission further stated that the "[r]esolution of any economic impact issues that may arise, and a determination of whether grant of the application would serve the public interest, would be dictated by the circumstances of the particular case before us." *Id.* at 4456.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

COMSAT GENERAL CORPORATION — File No. I-T-C-90-031

Application for authority to establish channels of communication between an international earth station at Rosslyn, Virginia and INTELSAT satellites for the provision of INTELSAT Business Services.

Application for authority to construct and operate international earth station facilities at Rosslyn, Virginia for the provision of INTELSAT Business Services. — File No. CSG-90-005-P/L

ORDER AND AUTHORIZATION

Adopted: January 16, 1990; Released: January 22, 1990

By the Chief, International Facilities Division:

1. The above-captioned applications, filed on December 1, 1989, by Comsat General Corporation (Comsat General), request authority pursuant to Section 214 of the Communications Act of 1934, as amended, to establish channels of communications between international earth station facilities at Rosslyn, Virginia and INTELSAT Atlantic Ocean Region (AOR) satellites for the provision of INTELSAT Business Services (IBS). Further, authority is requested pursuant to Title III of the Communications Act of 1934, as amended, and Sections 201(c)(4), (c)(6) and (c)(7) of the Communications Satellite Act of 1962, as amended, to construct and operate international earth station facilities at Rosslyn, Virginia, for the provision of IBS. The applications were placed on public notice on December 13 and 6, 1989, respectively. No comments were received.

2. The proposed earth station will consist of a 4.5-meter antenna which shall meet INTELSAT Standard E-1 technical parameters and communicate with an appropriate INTELSAT satellite in the AOR operating in the 14.0-14.5 GHz transmitting frequency band and the 10.95-11.2 GHz and 11.45-11.7 GHz receiving frequency bands. The earth station will be located at Rosslyn, Virginia and will be used to provide a full range of IBS services.

3. Comsat General's legal, financial and technical qualifications to construct and operate the proposed earth station are established. Comsat General provides various international services and has been authorized to construct and operate other earth station facilities for IBS services. Comsat General has completed the necessary frequency coordination.

4. The proposed earth station is consistent with the Commission's policy on the ownership and operation of U.S. international earth stations[1] and its scope of operation will be the same as that permitted by the Commission in previous IBS authorizations.[2] We will limit the authorization to the provision of IBS and those video services compatible with the station's digital format operation. To the extent that the applicant may seek to provide certain newly proposed INTELSAT services which fall within the IBS/television service category, we will not restrict operation of the proposed station. However, it may not provide any service which falls outside the IBS/television service category. Any use of the proposed station as a multipurpose earth station would require a separate application for the additional authority.

5. Upon consideration of the applications, we find that authorization of the requested earth station facilities and IBS services would serve the public convenience and necessity.

6. Accordingly, IT IS ORDERED pursuant to Sections 214, 304, 309 and 319 of the Communications Act of 1934, as amended, and Section 201(c) of the Communications Satellite Act of 1962, as amended, that applications File Nos. I-T-C-90-031 and CSG-90-005-P/L ARE GRANTED, and Comsat General is authorized to:

a. construct and operate the proposed 4.5-meter Ku-band earth station at Rosslyn, Virginia, to provide IBS and related digital video services, [3] and

b. establish channels of communication between the Rosslyn, Virginia earth station and INTELSAT AOR satellites for the provision of IBS and related digital video services between the U.S. and those countries that now or hereafter will be listed in Comsat's tariff provisions for the space segment component of IBS or digital video services.

7. IT IS FURTHER ORDERED that before completion of equipment installation and facility activation, the applicant shall provide the Commission with a summary of equipment which was actually installed.

8. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

9. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between Comsat General and its correspondents, and copies of the agreements shall be filed with the Commission within 30 days of their execution.

10. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International
Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] Earth Station Ownership, 100 FCC 2d 250 (1984).

[2] Upon grant of an IBS/television service application, the applicant will be issued a combined Radio Station Construction Permit and License (FCC Form 456-P). While the Commission will limit the use of the authorized facilities to the provision of IBS and/or television services, carriers may seek additional authorization if they desire to use these facilities as multipurpose earth stations.

[3] This authorization is not to be construed as permitting the provision of IBS between earth stations located within the United States.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CONFERENCE-CALL USA, INC.,
Complainant,

v. File No. E-89-86

SOUTHWESTERN BELL TELEPHONE COMPANY,
Defendant.

ORDER

Adopted: January 12, 1990; Released: January 22, 1990

By the Chief, Enforcement Division:

1. On March 1, 1989, Conference-Call USA, Inc. (Conference-Call), filed a formal complaint with the Commission against Southwestern Bell Telephone Company (Southwestern Bell). Conference-Call alleged that Southwestern Bell refused to route conference call traffic to competitive suppliers such as Conference-Call on a nondiscriminatory basis.

2. With the assistance of the Enforcement Division, the parties entered into negotiations aimed at resolving their dispute. On December 13, 1989, Conference-Call and Southwestern Bell jointly filed with the Commission a stipulation for dismissal with prejudice, stating that each party would bear its own costs. Because no issues remain in controversy and dismissal of the complaint would be in the public interest, we grant the parties' request for dismissal.

3. Accordingly, IT IS ORDERED, pursuant to authority delegated by Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the complaint filed by Conference-Call USA, Inc., IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Hess
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CONFERENCE-CALL USA, INC.,
Complainant,

v. File No. E-89-84

PACIFIC BELL TELEPHONE COMPANY,
Defendant.

ORDER

Adopted: January 12, 1990; Released: January 22, 1990

By the Chief, Enforcement Division:

1. On February 10, 1989, Conference-Call USA, Inc. (Conference-Call), filed a formal complaint with the Commission against Pacific Bell Telephone Company (Pacific Bell). Conference-Call alleged that Pacific Bell refused to route conference call traffic to competitive suppliers such as Conference-Call on a nondiscriminatory basis.

2. With the assistance of the Enforcement Division, the parties entered into negotiations aimed at resolving their dispute. On December 7, 1989, Conference-Call filed with the Commission a motion to dismiss with prejudice, stating that the parties had reached agreement over the routing of conference call requests from the public. Because no issues remain in controversy and dismissal of the complaint would be in the public interest, we grant Conference-Call's request for dismissal.

3. Accordingly, IT IS ORDERED, pursuant to authority delegated by Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the complaint filed by Conference-Call USA, Inc., IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Hess
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ZERO PLUS DIALING, INC.,
Complainant,

v. File No. E-88-76

BELLSOUTH SERVICES,
Defendant.

ORDER

Adopted: January 12, 1990; Released: January 22, 1990

By the Chief, Enforcement Division:

1. On June 2, 1988, Zero Plus Dialing, Inc. (ZPD) filed a formal complaint with the Commission against BellSouth Services (BellSouth). ZPD alleged that BellSouth refused to provide ZPD with billing and collection services for BellSouth credit card calls and asked the Commission to order BellSouth to do so.

2. With the assistance of the Enforcement Division, the parties engaged in lengthy negotiation aimed at resolving their dispute. On December 6, 1989, ZPD filed a request for dismissal with the Commission, stating that agreement on billing and collection has been reached by the parties. Because no issues remain in controversy and dismissal of the complaint would be in the public interest, we grant ZPD's request for dismissal.

3. Accordingly, IT IS ORDERED, pursuant to authority delegated by Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the complaint filed by Zero Plus Dialing, Inc., IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Hess
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Request for Ruling by Press
Television Corporation Concerning
Applicability of Section 73.658(m)
of the Commission's Rules in the
Orlando-Daytona Beach-Melbourne-
Cocoa Television Market

ORDER GRANTING EXTENSION OF TIME

Adopted: January 25, 1990; Released: January 26, 1990

By the Acting Chief, Policy and Rules Division:

1. On December 5, 1989, the Commission adopted a *Memorandum Opinion and Order*, FCC 89-338, granting a request by Press Television Corporation, licensee of television station WKCF(TV), Clermont, Florida, to include its station in the Orlando-Daytona Beach-Melbourne-Cocoa television market for purposes of Section 73.658(m), the nonnetwork territorial exclusivity rule. On January 11, 1990, Meredith Corporation filed a Petition for Reconsideration of this action.

2. On January 23, 1990, Press Television Corporation filed a Consent Motion for Extension of Time requesting that the time for filing oppositions to the Petition for Reconsideration be extended from January 24, 1990, to January 29, 1990. Petitioner indicates that additional time is needed to prepare its response and that all other parties participating in this proceeding have consented to its request.

3. In light of the limited nature of the time extension requested, we believe that a grant of Press Television's motion will not significantly delay resolution of this matter. Therefore, we find it appropriate to extend the deadline for filing oppositions to the Petition for Reconsideration as requested.

4. Accordingly, IT IS ORDERED that the Consent Motion for Extension of Time filed by Press Television Corporation IS GRANTED. IT IS FURTHER ORDERED that the time for filing oppositions and replies in this proceeding ARE EXTENDED to January 29, 1990, and February 5, 1990, respectively.

5. This action is taken pursuant to authority found in Sections 4(i) and 303(r) of the Communications Act, as amended, and Sections 0.204(b), 0.283, 1.45 and 1.46 of the Commission's rules.

6. For further information concerning this proceeding, contact Marcia Glauberman, Policy and Rules Division, Mass Media Bureau, (202) 632-6302.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Acting Chief, Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 90-5

In the Matter of

Amendment of Part 94 of the Commission's Rules to Permit Private Video Distribution Systems of Video Entertainment Access to the 18 GHz Band	RM-6014

NOTICE OF PROPOSED RULE MAKING

Adopted: January 11, 1990; Released: January 23, 1990

By the Commission:

I. INTRODUCTION

1. This Commission has before it a Petition for Rule Making[1] (Todd Petition) and the comments filed in response thereto, concerning the distribution of video entertainment material on frequencies allocated to the Private Operational-Fixed Microwave Service (OFS).[2] By this *Notice of Proposed Rule Making*, we propose to allow OFS licensees to use the 6 MHz channels in the 17.7 - 19.7 GHz (18 GHz) band for the distribution of video entertainment material. We also propose not to limit the number of channels that can be assigned to OFS licensees for this purpose. These proposals will serve the public interest by creating additional options for OFS licensees and by making more effective use of the radio spectrum.

II. BACKGROUND

2. Part 94 of our Rules provides frequencies intended to satisfy the needs of private entities for point-to-point and point-to-multipoint microwave communications. These stations are not open to public correspondence and are generally operated by and for the sole use of those persons or agencies eligible to operate their own radiocommunication facilities.[3] Eligibility in Part 94 is limited to persons qualified for licensing in radio services under either Parts 80, 87, or 90 of our Rules.[4] Historically, the delivery of video entertainment material has been prohibited on OFS frequencies. In 1981, however, this Commission modified this policy by permitting OFS licensees to use certain frequencies to distribute their products, including video entertainment, to their customers.[5] Use of OFS spectrum for this purpose was restricted to the point-to-multipoint frequencies in the 2500 - 2690 MHz band and frequencies above 21.2 GHz.[6]

3. Frequencies in the 18 GHz band are shared by the Private, Common Carrier, and Mass Media Radio Services.[7] In Docket No. 82-334, the Commission rechanneled this band and created channels of varying widths to accommodate a diverse range of communications, including the distribution of video programming.[8] OFS users, however, are precluded from using any frequencies in this band as the final link in the distribution of video entertainment material.[9] OFS licensees operating in this band are also subject to the general Part 94 provision that limits licensees to four channels per transmitter location.[10]

III. PETITION AND COMMENTS

4. Todd is the owner/operator of several satellite master antenna television (SMATV) systems in the New York City area. As a business entity, Todd is eligible to hold OFS licenses. The Todd Petition discusses the need of SMATV operators for additional microwave spectrum. Todd states that its typical operations include the wiring of a multiple unit residential building, the placement of a satellite dish on the building roof to receive programming and the management of the SMATV service. Todd states that it is often impossible, however, to install a satellite earth station atop each building that contracts with an SMATV operator. Todd therefore seeks the proposed rule changes to facilitate the delivery of multiple channel video signals across short distances.[11]

5. Todd contends that the 18 GHz band is best suited for its intended operation. It bases this on the fact that the band is already available to OFS users and that it has seventy-two 6 MHz channels that are available for video distribution by licensees in the Cable Television Relay Service (CARS).[12] Although these 6 MHz channels are currently available to OFS licensees, they cannot be used as the final link of a video distribution system. Todd recognizes that OFS frequencies above 21.2 GHz can be used to deliver video entertainment to any location. It states, however, that licensees are limited to only four channels per path per transmitter site[13] while the typical SMATV operator needs to deliver 15 to 36 one-way video channels.[14] Because Todd regards its proposed use as compatible with CARS use of the 6 MHz channels in the 18 GHz band, Todd asks that we allow OFS licensees to deliver video entertainment material on those channels.[15] Further, Todd requests that we not limit the number of channels licensees can be assigned for the distribution of video entertainment.

6. In response to the Todd Petition, we received comments from 17 parties.[16] Eleven of these filings were statements of support from other SMATV operators who state that the proposed rule changes would better enable them to compete with other video distributors such as the Cable Television Service (CATV) and the Multipoint Distribution Service (MDS).[17] M/A COM's Microwave Associates Communications Division (M/A COM) urges adoption of the petition and further states that we should expand the scope of the petition by allowing video distribution over the entire 18 GHz band, not only the 6 MHz channels. According to M/A COM, this action would accommodate various modulation techniques, thus providing each licensee the flexibility to choose the type of modulation that best suits its individual needs.[18] MCI Telecommunications Corporation (MCI) expresses concern that the proposed operation, which would allow multiple paths from a single transmitting point, may be an inefficient use of the private microwave spectrum. Also, MCI recommends that the prior coordination procedures of Part 21 of the Commission's Rules should apply to all users of the shared 18 GHz band in order to protect existing users from unwarranted interference.[19] Finally,

Hughes Aircraft Company states in reply comments that it can begin supplying 18 GHz AM video equipment whenever significant demand appears.[20]

7. Statements of opposition were filed by the American Petroleum Institute (API), the Utilities Telecommunications Council (UTC), and Avantek, Inc., a microwave equipment supplier. Each of these commenters states that the 18 GHz band has been considered the primary option for OFS licensees seeking to migrate from the reallocated 12.2 - 12.7 GHz band.[21] API, for example, states that expanding 18 GHz eligibility would adversely affect the utility of the band for displaced 12 GHz OFS licensees.[22] Also, these commenters state that the reason the 18 GHz band appears to be sparingly used is because it was only recently allocated and equipment is only now becoming available.[23] Finally, UTC argues that Todd has not shown why OFS frequencies above 21,200 MHz cannot be used to satisfy its needs.[24]

IV. DISCUSSION AND PROPOSALS

8. The issue before us in this proceeding is whether the public interest benefits derived from allowing OFS licensees to deliver video entertainment material in the 18 GHz band outweigh any potential negative impact on existing and future licensees of this band. While it may be possible for Todd to satisfy its needs on frequencies above 21,200 MHz the proposals before us would serve the public interest by promoting greater use of the 18 GHz band. Also, the 18 GHz band is better suited for video operations than the 21 GHz frequencies. The current channeling plan contains provisions for video operations to support CARS stations and, because the band is shared with CARS, suitable equipment already exists. The primary argument against the proposals is that by increasing the number of potential users of the 18 GHz band, the Commission would be affecting the utility of that band for displaced 12 GHz OFS licensees. For the reasons discussed below, we believe the potential for negative impact to 12 GHz OFS licensees is minimal, while the benefits of permitting the proposed use of the band are significant. We therefore propose amending our Rules to authorize OFS licensees to deliver video entertainment material in the 18 GHz band.

9. The Todd Petition requests the use of the available 6 MHz channels in the 18 GHz band.[25] As their availability to CARS would indicate, these channels are already intended to be used for video transmissions.[26] Todd's proposed use of these channels is therefore consistent with the current channelization scheme. Furthermore, this proposed use of the spectrum would serve the public interest by creating additional sources for the delivery of video entertainment programming.[27] For these reasons, we tentatively conclude that present needs for microwave spectrum should take precedence over possible future needs of other users, and we propose to allow OFS licensees to distribute video entertainment material in the 18 GHz band.

10. Opposition to the Todd Petition concentrated on the argument that the 18 GHz band was intended as the primary relocation band for the displaced 12 GHz OFS licensees. We note that these licensees were given a special five-year accommodation period to relocate their operations.[28] The provisions of these special accommodations included access to the 12.7 -13.2 GHz band as well as preferences for the displaced licensees.[29] This accommodation period ended on September 9, 1988. We believe that ample 18 GHz equipment is now available to make this band an attractive option for applicants. On the other hand, those licensees who continue operating in the 12 GHz band, and who have been reclassified to a secondary, non-interfering status, have apparently made business decisions to remain in that band because of the compatibility of their operations with DBS or their opinions as to the viability of DBS service. We believe that continuing to reserve spectrum for these licensees, when faced with the demonstrated need for this spectrum by other industries, is not in the public interest. Relocation of any 12 GHz OFS licensees to other spectrum will have to proceed pursuant to spectrum availability. We do, however, seek comments on this issue.[30]

11. We seek comments on whether we should allow the distribution of video entertainment material over the entire 18 GHz band or whether we should restrict such transmissions to the available 6 MHz channels. Our tentative position is that it would be more spectrum efficient to restrict these operations to the 6 MHz channels.[31] The 18 GHz band is shared by many different radio services. While it is true that the band is not heavily used at this time, we anticipate more licensees as other frequency bands become more congested. An SMATV operator seeking spectrum to distribute video over 20 channels using frequency modulation techniques would require over 400 megahertz of spectrum per link. By restricting video distribution to the 6 MHz channels, the same SMATV operator using amplitude modulation techniques would require 120 megahertz of spectrum per link. On the other hand, allowing access to the entire 18 GHz band would provide licensees with flexibility to use alternative forms of modulation. We therefore solicit comments on this issue.

12. Also at issue here is whether OFS licensees delivering video programming should be assigned a limited number of channels. As noted earlier, Section 94.15(g) of the Rules appears to limit licensees to four channels per transmitter site. Although the rule, as written, is vague, we have consistently interpreted it to permit licensees on frequencies below 21.2 GHz to be assigned 4 channels at each transmitter site. On frequencies above 21.2 GHz, licensees can obtain four frequencies per path per transmitter site. Allowing SMATV operators, for example, to deliver video entertainment material without adjusting the requirements of this rule would not provide that industry with any real spectrum relief. A licensee distributing programming on four or fewer video channels would be placed at a severe competitive disadvantage to other program delivery sources. We therefore propose that OFS licensees delivering video entertainment in the 18 GHz band not be constrained by these limitations and that Section 94.15(g) be amended accordingly. We seek comments on this proposal and on whether a better solution would be to adopt a ceiling higher than four channels.[32] We also propose to clarify § 94.15(g) to reflect past practice. Finally, in response to the comments of MCI urging that Part 94 applicants for the 18 GHz band follow the coordination procedures contained in Part 21, we note that Section 94.63 already contains this requirement.[33] Therefore, no action is necessary on this issue.

13. We seek comments on the proposals contained herein and will consider alternatives that are consistent with our goal of providing for more effective use of the spectrum and of satisfying the growing needs of OFS

users. As noted above, we are sensitive to the needs of OFS licensees at 12 GHz. We tentatively conclude, however, on the basis of the comments submitted in response to the Todd Petition and our own analysis, that this group of licensees would not be harmed if these proposals were adopted.

V. INITIAL REGULATORY FLEXIBILITY ANALYSIS

A. Reason for Action.

14. The Commission is proposing these rule changes to permit OFS licensees to deliver video entertainment material on certain microwave frequencies in the 18 GHz band. These changes will, for example, allow SMATV operators to deliver video programming to locations removed from their satellite earth station. This action is intended to extend the ability of private video distributors to provide their services.

B. Legal Basis.

15. Sections 4(i), 303(g), 303(r), and 331(a) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(g), 303(r), and 332(a).

C. Reporting, recordkeeping and other compliance requirements.

16. No new requirements will be imposed upon licensees because of this action.

D. Federal rules which overlap, duplicate or conflict with this rule.

17. None.

E. Description, potential impact, and number of small entities involved.

18. Many small entities could be positively affected by this proposal because additional spectrum would be made available to them to provide their video distribution services. The number of these small entities that will be affected is unknown. This proposal, however, is increasing the number of potential users of a certain portion of the radio spectrum. Comments were submitted that stated that such a proposal would increase the number of potential users of that spectrum, which could cause congestion on these frequencies. Congestion could limit the availability of these frequencies and thus have a negative impact upon the existing eligible users of this spectrum.

F. Any significant alternatives minimizing the impact on small entities and consistent with the stated objectives.

19. As an alternative, the Commission could have limited the scope of this proceeding to frequencies above 21.2 GHz and thus eliminated any potential negative impact to small entities that may need access to the 18 GHz band. The current record in this proceeding, however, indicates that the potential for any negative impact is small and that the 18 GHz band is better suited for the needs of the SMATV industry.

VI. PAPERWORK REDUCTION ACT STATEMENT

20. The proposals contained herein have been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection and/or recordkeeping, labeling, disclosure or record retention requirements, and will not increase burden hours imposed upon the public.

VII. PROCEDURAL MATTERS

21. For purposes of this non-restricted notice and comment rule making proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period. *See generally* 47 C.F.R. § 1.1206(a). The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. 47 C.F.R. § 1.1202(f). During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by Commission or staff for the clarification or adduction of evidence or the resolution of issues in the proceeding. 47 C.F.R. § 1.1203.

22. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding, or (2), if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. 47 C.F.R. § 1.1202(b). Any person who makes or submits a written *ex parte* presentation shall provide on the same day it is submitted two copies of same under separate cover to the Commission's Secretary for inclusion in the public record. The presentation (as well as any transmittal letter) must clearly indicate on its face the docket number of the particular proceeding(s) to which it relates and the fact that two copies of it have been submitted to the Secretary, and must be labeled or captioned as an *ex parte* presentation.

23. Any person who in making an oral *ex parte* presentation presents data or arguments not already reflected in that person's written comments, memoranda, or other previous filings in that proceeding shall provide on the day of the oral presentation an original and one copy of a written memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. The memorandum (as well as any transmittal letter) must clearly indicate on its face the docket number of the particular proceeding and the fact that an original and one copy of it have been submitted to the Secretary, and must be labeled or captioned as an *ex parte* presentation. 47 C.F.R. § 1.1206.

24. Authority for issuance of this *Notice of Proposed Rule Making* is contained in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303(r). Interested persons may file comments on or before ***April 18, 1990***, and reply comments on or before ***May 21, 1990***. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. In reaching its decision, the Commission may take into consideration in-

formation and ideas not contained in the comments, provided that the fact of the Commission's reliance on such information is noted in the Report and Order.

25. In accordance with the provisions of Section 1.419 of the Commission's Rules, 47 C.F.R. § 1.419, formal participants shall file an original and five copies of their comments and other materials. Participants wishing each Commissioner to have a personal copy of their comments should file an original and 11 copies. Members of the general public who wish to express their interest by participating informally may do so by submitting one copy. All comments are given the same consideration, regardless of the number of copies submitted. All documents will be available for public inspection during regular business hours in the Commission's Public Reference Room at its headquarters at 1919 M Street, N.W., Washington, D.C.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

LIST OF COMMENTERS

Comments

1) TeleCom Construction Company
2) Channel One, Inc.
3) Tri-Star Cablevision, Inc.
4) Telecast Inc.
5) Birdfinder Cable Company
6) Skylink America Inc.
7) R & R Technologies, Inc.
8) ACS Enterprises, Inc.
9) Sat/Span Communications
10) Spencer & Associates
11) M/A-COM Microwave Associates Communications Division
12) Avantek, Inc.
13) American Petroleum Institute
14) The Utilities Telecommunications Council
15) MCI Telecommunications Corporation

Reply Comments

1) Todd Communications Systems
2) Hughes Aircraft Company, Microwave Products Division

APPENDIX B

47 C.F.R. Part 94 is proposed to be amended as follows:

1. The authority citation for Part 94 continues to read as follows:

Authority: Sections 4, 303, 48 Stat., as amended, 1066, 1082; 47 U.S.C. 154, 303, unless otherwise noted.

2. 47 C.F.R. § 94.9 is proposed to be amended by revising paragraphs (b)(2)(iii) and (b)(3) to read as follows:

§ 94.9 Permissibility of communications.

* * * * *

(b) * * *

(1) * * *

(2) * * *

(iii) OFS licensees may deliver any of their own products or services to any receiving location in the frequency bands 6425-6525 MHz, 18142-18580 MHz, and on frequencies above 21,200 MHz.

(3) To provide the final link in the chain of transmission of program material to cable television systems, multipoint distribution systems, or master antenna TV systems, except in the frequency bands 6425-6525 MHz, 18142- 18580 MHz and on frequencies above 21,200 MHz.

3. 47 C.F.R § 94.15 is proposed to be amended by revising paragraph (g) to read as follows:

§ 94.15 Policy governing the assignment of frequencies.

* * * * *

(g) Except as provided in paragraph (h) of this section, applicants for frequencies below 21,200 MHz are limited to four transmit frequencies per band per transmitter site. Applicants for frequencies above 21,200 MHz are limited to four transmit frequencies per path per transmit location. Further, master and remote stations using frequencies listed in § 94.65(a)(1) will not normally be authorized more than four (12.5 kHz) frequencies or frequency pairs. Licensees distributing multi-channel video entertainment material in the frequency band 18142-18580 MHz are not restricted in the number of channels that they may receive for that purpose.

* * * * *

4. 47 C.F.R. § 94.61 is proposed to be amended by revising the entry for the frequency band 17700 to 18580 MHz in the frequency table following paragraph (b) to read as follows:

§ 94.61 Applicability.

* * * * *

(b) * * *

FREQUENCY BAND (MHz)	
* * * * *	
17700-18580 . . .	(6) (8) (10) (23) (27)
* * * * *	

FOOTNOTES

[1] Petition for Rule Making, RM-6014, filed on June 8, 1987 by Todd Communications Systems. The petition was placed on Public Notice on July 23, 1987, Report No. 1669. On February 1, 1988, we received a request to substitute a new corporate entity, Todd Integrated Systems, Inc., as the petitioner in this rule making. Both these entities are controlled by the same parties.

[2] The Private Operational-Fixed Microwave Service is governed by Part 94 of the Commission's Rules, 47 C.F.R. § 94.1, *et seq.*

[3] *See* 47 C.F.R. § 94.3. *C. f.*, First Report and Order, PR Docket No. 83-426, 57 RR 2d 1486 (1985) (Authorizing leasing of system capacity by OFS licensees to Part 94 eligibles).

[4] *See* 47 C.F.R. § 94.5.

[5] *See* First Report and Order, Docket No. 19671, 86 FCC 2d 299 (1981), and Memorandum Opinion and Order, Docket No. 19671, 99 FCC 2d 715 (1983).

[6] *Id.* at 726-727.

[7] The 18 GHz band is available to stations licensed under the following Parts of our Rules: 1) Part 21, Domestic Public Fixed Radio Services; 2) Part 25, Satellite Communications; 3) Part 74, Experimental, Auxiliary, and Special Broadcast and Other Program Distributional Services; 4) Part 78, Cable Television Relay Service; and, 5) Part 94, Private Operational-Fixed Microwave Service.

[8] Memorandum Opinion and Order, GEN Docket 82-334, 56 RR 2d 1171 (1984).

[9] *See* 47 C.F.R. § 94.9.

[10] *See* 47 C.F.R. § 94.15(g).

[11] Todd Petition at 1-2.

[12] *Id.* at 4-5. The 6 MHz channels available to OFS licensees are located in the frequency range 18142 MHz through 18580 MHz. *See* 47 C.F.R. § 94.65(j).

[13] *Id.* at 3.

[14] Reply Comments of Todd at 7.

[15] *Id.*

[16] *See* Appendix A for a complete list of commenters.

[17] *See, e.g.*, the Comments of Telecom Construction Corporation, Tri-Star Cablevision, Inc., Telecast Inc.

[18] Comments of M/A COM at 5. Generally, video transmissions on channels less than 10 MHz wide are limited to using amplitude modulation (AM). Video transmissions using frequency modulation (FM) generally require channel widths of 20 MHz.

[19] Comments of MCI at 3.

[20] Reply Comments of Hughes Aircraft Company at 2.

[21] *See* Opposition of API at 4, Opposition of UTC at 4, and Opposition of Avantek at 3. The 12.2 - 12.7 GHz band was reallocated from OFS to the Direct Broadcast Satellite (DBS) Service. *See Report and Order*, GEN Docket No. 80-603, 90 FCC 2d 676 (1982). OFS users licensed in this band on or before September 9, 1983, could continue to operate on a co-primary basis until September 9, 1988. *See* 47 C.F.R. § 94.93. All OFS use of the 12.2 - 12.7 GHz band is now on a secondary, non-interfering basis to operating DBS stations.

[22] Opposition of API at 4.

[23] *See, e.g.*, Opposition of API at 5, Opposition of UTC at 6, Opposition of Avantek at 4.

[24] Opposition of UTC at 8.

[25] Todd also supports the proposal by M/A COM to expand the scope of the proposal to include the entire 18 GHz band. *See* Reply Comments of Todd at 8. We will further discuss this issue in paragraph 11, *infra*.

[26] *See* 47 C.F.R. § 78.18.

[27] We have recently initiated a proceeding concerning the definition of a cable system. *See* Notice of Proposed Rule Making, MM Docket No. 89-35, adopted February 1, 1989, 4 FCC Rcd 2088 (1989). The outcome of that proceeding could affect the use of OFS frequencies for the purposes proposed in this item.

[28] First Report and Order, GEN Docket No. 82-334, 54 RR 2d 1001 (1983).

[29] *See* 47 C.F.R. § 94.93.

[30] We also seek comments from fixed-satellite service providers regarding their plans to use the 18 GHz band and appropriate sharing criteria.

[31] We have proposed to allow video distribution on the 5 channel pairs in the 18 GHz band that are reserved for Digital Termination Systems (DTS), which are intended for point-to-multipoint operation. *See* Notice of Proposed Rule Making, PR Docket No. 88-191, 3 FCC Rcd 3532 (1988).

[32] For example, in its Reply Comments, Todd states that the typical SMATV operator needs to deliver 15 to 36 channels to be competitive in the video marketplace. *See* paragraph 5. We could limit licensees delivering video entertainment to a number of channels that falls within these figures.

[33] *See* 47 C.F.R. § 94.63(a).

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
January 5, 1990

Released: January 18, 1990

8330-SB
C11-552
C2-307
C2-607
C4-439

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Andy Hilger, President
WJON Broadcasting Company
Radio Station WJON(AM)
P.O. Box 220
St. Cloud, Minnesota 56302

Dear Mr. Hilger:

This is in reference to the Commission's investigation regarding political editorials broadcast by radio station WJON(AM), St. Cloud, Minnesota, in connection with the Sherburne County Commissioner race last November. On the basis of a complaint received from Ms. Patricia Rettler, a representative of Mr. Alvin Ayers, a candidate in that race, this office initiated an inquiry on January 23, 1989. We received your response of February 13, 1989, and the complainant subsequently filed additional statements to support the complaint.

The complainant describes two instances in which Station WJON may have violated the Commission's rules. There is no dispute as to the facts. First, in order to determine whom to endorse, you state that you interviewed off-the-air both Mr. Ayers and his opponent, Mr. Norm Ecklund, along with several other local candidates. You chose to endorse Mr. Ecklund and thereafter invited Mr. Ayers to send a spokesperson to the station to tape a response to your endorsement. It is the station's policy, when airing responses to endorsements, to broadcast such responses back-to-back with the endorsement. However, on October 21 and 22, 1988, the station aired six editorials endorsing Mr. Ecklund and only four responses in support of Mr. Ayers. Both the Ecklund and Ayers announcements were of the same approximate length. You explain that the announcers on duty at the time in question "made honest mistakes" after the editorial endorsement was run by proceeding to the next logged assignment without airing the response announcement. When Mr. Ayers telephoned the station to complain, his call was apparently misdirected. You contend that if you or the station manager had been informed, Mr. Ayers would have been granted more broadcast time.

Ms. Rettler also complains about your list of endorsements of certain candidates, called "Endorsement Recaps," which aired at least six times on November 7, 1988, the day before the election, and contained the statement: "The choices are those of this editorialist alone." In response to our inquiry, you contend that you thoroughly researched the qualifications and positions of over 40 candidates and "having done all of this, [you] feel a simple listing of [your] choices is a service to the listener." You further argue that newspapers carry similar listings as a service to readers and that an "effort to criticize that endorsement listing would be a real chill on free speech."

Section 73.1930(a) of the Commission's rules provides:

> (a) Where a licensee, in an editorial,
>
> (1) Endorses or,
>
> (2) Opposes a legally qualified candidate or candidates, the licensee shall, within 24 hours after the editorial, transmit to, respectively,
>
> (i) The other qualified candidate or candidates for the same office or,
>
> (ii) The candidate opposed in the editorial,
>
> (A) Notification of the date and the time of the editorial,
>
> (B) A script or tape of the editorial and
>
> (C) An offer of reasonable opportunity for the candidate or a spokesman of the candidate to respond over the licensee's facilities. Where such editorials are broadcast on the day of the election or within 72 hours prior to the day of the election, the licensee shall comply with the provisions of this paragraph sufficiently far in advance of the broadcast to enable the candidate or candidates to have a reasonable opportunity to prepare a response and to present it in a timely fashion.

The Commission defines a station editorial as "a statement representing the view of the licensee of the station, such as its owner, a principal officer, the manager, or another employee if he is permitted by the licensee to speak for the station." *The Law of Political Broadcasting and Cablecasting*, 100 FCC 2d 1476, 1529 (1984). (We have enclosed a copy of the cited publication for your information.) The political editorial rule does not prohibit the broadcast of editorials endorsing or opposing legally qualified candidates. Rather, it requires the licensee to offer the candidate adversely affected by the editorial a "reasonable opportunity" to respond in person or through a spokesperson. What constitutes a "reasonable opportunity" to respond varies with the particular circumstances of each case. The licensee is expected to make good faith reasonable judgments and negotiate with the candidate involved, giving consideration both to the amount of time to be afforded for response and the frequency of the announcements. *George E. Cooley*, 10 FCC 2d 970 (1967). The Commission, in its Order adopting the political editorial rule, stated that "a comparable opportunity in time and scheduling will be clearly appropriate" in most cases. *In the Matter of Amendment of Part 73 of the Rules*, 8 FCC 2d 721, 727 (1967). It further stated that in a case "where the endorsement of a candidate is one of many and involves just a few seconds, a 'reasonable opportunity' may require more than a few seconds if there is to be a meaningful response." *Id.*

Regarding the first incident occurring October 21 and 22, 1988, the station aired six editorials in which you endorsed Mr. Ecklund and four responses by Ms. Rettler on behalf of Mr. Ayers (a ratio of 3 to 2). From the material submitted to us in this case, it appears that the station attempted to afford Mr. Ayers the same amount of time and the same frequency of announcements, but that the station inadvertently omitted two responses. The breakdown apparently occurred when Mr. Ayers or his representatives attempted to communicate the mistakes to the proper individuals at WJON, but failed to do so. This in turn prevented further negotiations between you and the candidate. It appears that the two omissions were inconsistent with the station's policy of following *every* endorsement with a response. However, it further appears that these omissions were inadvertent. Under these circumstances, we cannot find this was the type of flagrant violation of Section 73.1930 which warrants further Commission action.

As to the second incident involving your "Endorsement Recaps," Commission precedent is clear in this area. Station editorials which list a slate of candidates for election are within the purview of Section 73.1930(a). *The Law of Political Broadcasting and Cablecasting*, *supra*, at 1530. The fact that you stated in the "Endorsement Recaps" that the candidate choices were yours alone does not remove it from the rule. In *Richard A. Karr*, 32 FCC 2d 285 (1971), the licensee's president made endorsements on the day before an election, claiming that the statements represented only his "personal feelings." The endorsements were repeated during six news broadcasts. The Commission admonished the licensee stating that such endorsements by the president and controlling stockholder of a licensee "are indistinguishable from a station editorial" within the meaning of Section 73.1930. Thus, the candidates not endorsed should have been notified sufficiently far in advance, provided with a script or tape, and offered a reasonable opportunity to respond. You failed to do this.

We have reviewed the circumstances surrounding WJON's editorial endorsements of the Sherburne County Commissioner, and as we explained above, the incident involving the six editorials and four responses aired October 21 and 22, 1988, does not warrant further Commission action. We do, however, determine that violations of Section 73.1930(a) of the Commission's rules occurred on November 7, 1988, when WJON aired the "Endorsement Recaps" at least six times without complying with the rule's notice requirements. Although you believe this was a service to the listeners of WJON and within the "letter of law," the Commission has never considered lack of knowledge of the application of its rules and regulations as justification for violations thereof. Licensees are expected to know and comply with the Commission's rules and regulations.

In view of the foregoing, WJON Broadcasting Company, licensee of radio station WJON(AM), St. Cloud, Minnesota, IS ADMONISHED for failing to afford reasonable opportunity for response to at least six editorial endorsements on November 7, 1988, in violation of the Commission's rules. Based upon the information presently available to the Enforcement Division, no further action is contemplated in regard to this matter. However, now that you are fully apprised of the application of Section 73.1930(a), it is expected that care will be exercised to assure that such a violation does not recur. This matter is being made a part of WJON's file.

Staff action is taken here under delegated authority. Application for Review by the full Commission may be requested within thirty days of the date of public notice of this letter (see Commission Rule 1.4(b) [47 C.F.R. Section 1.4(b)]) by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration and, if mailed, should be sent by certified mail. Copies must be sent to the parties to the complaint. *See* Commission Rule 1.115 (47 C.F.R. Section 1.115).

Sincerely,

Milton O. Gross, Chief
Fairness/Political Programming Branch
Enforcement Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications Tariff F.C.C. No. 16 — Transmittal No. 1869

MEMORANDUM OPINION AND ORDER

Adopted: January 12, 1990; Released: January 12, 1990

By the Chief, Common Carrier Bureau:

1. On October 30, 1989, AT&T Communications (AT&T) filed the above-captioned transmittal. By this transmittal, AT&T introduces rates and regulations for St. Louis Inbound Calling Service (SLICS), an end-to-end inbound calling service provided to the U.S. Army Personnel Department at its location in St. Louis, Missouri. SLICS charges consist of distance-sensitive usage charges which are substantially discounted compared to those paid by Megacom 800 and basic 800 Service subscribers. US Sprint Communications Company Limited Partnership (Sprint) filed a petition to reject or alternatively to suspend and investigate the tariff on November 14, 1989 (Sprint Petition). AT&T filed a reply on November 22, 1989 (AT&T Reply).

2. Tariff 16 is limited to services provided to the government as the result of a competitive bidding process. This particular offering was developed to meet the specifications of a Department of Defense (DOD) solicitation for inbound switched service from the continental United States, Hawaii, Alaska, Puerto Rico, and the U.S. Virgin Islands for the U.S. Army Personnel Center in St. Louis. As required by the bid, SLICS is an end-to-end service that delivers incoming traffic gathered at an AT&T point of presence located at St. Louis to the U.S. Army's three personnel center locations in St. Louis. AT&T Description and Justification (D&J) at 2. SLICS is to be provided on a monthly basis and has an initial service period of three years, during which AT&T will not initiate any rate increases. AT&T Tariff F.C.C. No. 16, page 82.

3. Sprint claims that it is unlawful to limit this offering to only one branch office of one department of one federal government agency because, unlike AT&T's two previous Tariff 16 offerings which were made in response to very specific telecommunications needs of two government entities, there is no evidence that the US Army's St. Louis personnel office had any special telecommunications network or service needs.

4. Sprint also argues that discriminatory offerings such as SLICS cannot be justified on the basis that they involve service provided to "the government". *Id.* at 3-4. In addition, Sprint contends that the effect of this offering will be to further enhance AT&T's dominant position as an 800 service provider. *Id.* at 5. According to Sprint, within the 800 service price cap basket the incentive to cross-subsidize continues to exist in the same way as it has traditionally existed under rate of return regulation. *Id.* Moreover, Sprint argues that the migration of government customers out of Tariffs 1 and 2 into 16 will negate the benefits of price cap regulation. *Id.* at 6-7. Finally, Sprint alleges that AT&T improperly used the net revenue test to justify its Tariff 16 offerings. *Id.* at 7.

5. In response, AT&T asserts that SLICS is not a discriminatory offering and in fact, is similar to the Oahu Telephone System Outbound Calling Service which became effective without investigation. *See* Oahu Telephone System Outbound Calling Service, AT&T Tariff F.C.C. No. 16, 4 FCC Rcd 2231 (1989) (*OTCS Order*). AT&T Reply at 2-3. AT&T also disputes Sprint's claim that a government service tariff must involve a unique service element other than the rate level. *Id.* at 4-5.

6. Moreover, AT&T maintains that Sprint's argument that SLICS is unlawfully anticompetitive because AT&T is a dominant carrier is meritless. Furthermore, AT&T asserts that SLICS recovers all of its costs, including a proper allocation of joint and common costs. *Id. at 5.*

7. The Common Carrier Bureau has reviewed the tariff transmittal and the various pleadings. We conclude that no compelling argument has been presented that the tariff transmittal is patently unlawful so as to require rejection, and that no question has been presented that warrants investigation at this time.

8. Accordingly, IT IS ORDERED that the petition to reject or in the alternative to suspend and investigate AT&T, Tariff No. 16, Transmittal No. 1869, filed by US Sprint Communications Company Limited Partnership, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-119

In re Applications of

SILVER SPRINGS COMMUNICATIONS	File No. BPH-870630MS
A. P. WALTER, JR.	File No. BPH-870630MU
SILVER SPRINGS RADIO COMMUNICATIONS, LTD.	File No. BPH-870630MW
SILVER RADIO PARTNERS	File No. BPH-870630MX

for Construction Permit for a
New FM Station on Channel 238A
in Silver Springs, Florida

Appearances

Thomas A. Hart, Jr., Esquire, on behalf of Silver Springs Communications; *Dennis J. Kelly, Esquire*, on behalf of A. P. Walter, Jr.; *Robert J. Buenzle, Esquire*, and *Henry E. Crawford, Esquire*, on behalf of Silver Springs Radio Communications, Ltd.; *Michael J. Wilhelm, Esquire*, on behalf of Silver Radio Partners; and *Arthur Steinberg, Esquire*, and *Charles Dziedzic, Esquire*, on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOSEPH STIRMER

Issued: January 16, 1990; Released: January 24, 1990

PRELIMINARY STATEMENT

1. This proceeding was designated for hearing by *Hearing Designation Order* (HDO), DA 88-354, released April 8, 1988. The HDO consolidated the following eleven mutually exclusive applications for hearing: TRAX Broadcasting; Silver Springs Communications; A. P. Walter, Jr.; Silver Springs Radio Communications, Ltd.; Silver Radio Partners; Silver Springs Broadcasting, Inc.; Jim Johnson; Mark L. Wodlinger; Silver Springs-Ocala Broadcasting, Inc.; Ocala Radio, Inc.; and Sun Coast Communications Limited Partnership.[1]

2. Thereafter, six of these applications were dismissed. Silver Springs-Ocala Broadcasting, Inc., voluntarily moved for dismissal, which motion was granted by *Order* of the Presiding Judge, FCC 88M-1355, released May 5, 1988. Likewise, Sun Coast Communications Limited Partnership of Silver Springs voluntarily moved for dismissal, which motion was granted by *Order* of the Presiding Judge, FCC 88M-2260, released July 15, 1988. The applications of TRAX Broadcasting and Ocala Radio, Inc., were dismissed for failure to pay the required $6,000 hearing fee by *Order* of the Presiding Judge, FCC 88M-1644, released May 27, 1988. The application of Jim Johnson was dismissed pursuant to a "partial settlement," which was approved by *Memorandum Opinion and Order* of the Presiding Judge, FCC 88M-3641, released October 31, 1988. Silver Springs Broadcasting, Inc., did not pay the required $6,000 hearing fee by the April 29, 1988, deadline, and its application was dismissed by *Memorandum Opinion and Order* of the Presiding Judge, FCC 88M-1652, released May 31, 1988. The Review Board denied an appeal from such Order. (*Silver Springs Communications*, 3 FCC Rcd 5049 (1988), and an "Application for Review" was denied by the Commission (*Silver Springs Communications*, 4 FCC Rcd 4917 (1989)).

3. Following the dismissal of the foregoing applications, five applications remained in hearing status: Silver Springs Communications (Communications); A. P. Walter, Jr. (Walter); Silver Springs Radio Communications, Ltd. (Radio); Silver Radio Partners (Silver); and Mark L. Wodlinger (Wodlinger). The HDO specified the following issues against these applicants:

> 1. To determine whether there is a reasonable possibility that the tower heights and locations proposed by the following applicant would constitute a hazard to air navigation: Silver Radio Partners [Silver].
>
> 2. To determine which of the proposals would, on a comparative basis, best serve the public interest.
>
> 3. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

4. By *Memorandum Opinion and Order*, FCC 88M-2444, released August 1, 1988, the Presiding Judge granted, in part, Communications' "Motion to Enlarge the Issues" against Walter, and enlarged the issues to include:

> To determine with respect to A. P. Walter, Jr., whether he currently possesses "reasonable assurance" of the availability of his site, and if not, whether he is basically qualified.

By *Memorandum Opinion and Order*, FCC 88M-3079, released September 20, 1988, the site availability issue against Walter was resolved by Summary Decision in favor of the applicant. Also, with respect to Silver, the Presiding Judge resolved the air hazard issue in favor of the applicant pursuant to *Memorandum Opinion and Order*, FCC 88M-3206, released September 28, 1988.

5. A prehearing conference was convened on June 10, 1988, and hearing sessions were held on September 27, 28 and 29, 1988. The record was closed on September 29, 1988. (Tr. 469.) The record was subsequently reopened for acceptance of a "Stipulation" filed by Wodlinger on September 29, 1988; the record was again closed pursuant to *Order* of the Presiding Judge, FCC 88M-3257, released October 3, 1988.

6. After the record was closed, the Presiding Judge by *Memorandum Opinion and Order*, FCC 88M-3934, released November 18, 1988, specified the following issues against Wodlinger, and ordered that the record, findings and conclusions relative to said issues in MM Docket No. 88-170 would govern this proceeding:

> To determine whether Mark L. Wodlinger has violated 47 C.F.R. §74.1232(d), or has otherwise abused the Commission's FM translator licensing process, and, if so, what effect those violations and abuses have on his fitness to be a Commission licensee.
>
> To determine whether Mark L. Wodlinger has misrepresented to or lacked candor with the Commission regarding construction at WIXI(FM) translators in Port Charlotte, Marco Island, Fort Myers and Punta Gorda, Florida, and, if so, what effect those misrepresentations or lack of candor has on his fitness to be a Commission licensee.

Wodlinger failed to file "Proposed Findings of Fact and Conclusions of Law" as ordered, and his application was dismissed, with prejudice, by *Order* of the Presiding Judge, FCC 89M-12, released January 5, 1989.

7. By *Order* of the Presiding Judge, FCC 89M-114, released January 18, 1989, the issues were enlarged to include the following issue against Radio:

> To determine whether Silver Springs Radio is financially qualified to build and operate its proposed station, whether its financial certification constituted misrepresentation, and based upon the evidence adduced thereunder, whether Silver Springs Radio is basically qualified to be a Commission licensee.

8. "Proposed Findings of Fact and Conclusions of Law" on the comparative issue were filed by the applicants on November 30, 1988. "Reply Findings" were filed by Communications, Walter and Radio on December 16, 1988.

9. Hearing conferences relating to the financial issue regarding Radio were held on February 23, 1989, and May 31, 1989. Hearings on the added issue was held on June 1, 1989, and the record was closed on the same date.

10. "Proposed Findings of Fact and Conclusions of Law" on the financial issue were filed by Communications, Walter, and Radio on July 24, 1989, and "Reply Findings" were filed by Walter and Radio on August 7, 1989.

FINDINGS OF FACT

SILVER SPRINGS COMMUNICATIONS - (Communications)

Structure

11. Communications is a general partnership formed under the laws of Florida on June 29, 1987. There are three partners in Communications, and each holds equal ownership and voting power. Specifically, the ownership and voting rights of Communications' partners are as follows:

Robert D. Stoehr
1/3 ownership
1/3 vote

Thomas H. Poole, Sr.
1/3 ownership
1/3 vote

Rosetta Givens
1/3 ownership
1/3 vote

(Communications Ex. 1, p. 1.)

Integration

Robert D. Stoehr:

12. Mr. Stoehr is a white male and currently resides at 2341 South Avenue, Leesburg, Florida. Mr. Stoehr will move to Silver Springs, Florida, upon grant of Communications' application. (Communications Ex. 2, p. 1.)

13. Upon the grant of the Communications application, Mr. Stoehr will serve full time as station manager and will work a minimum of 40 hours per week in that capacity. As station manager, Mr. Stoehr will be responsible for the programming, sales, and engineering components of the station's operations. He will report directly to Rosetta Givens, the station's general manager. Mr. Stoehr is currently semi-retired. In the event he recommences employment, upon grant of the Communications application and commencement of operation, pursuant to Program Test Authority, Mr. Stoehr will terminate all other paid employment to satisfy his commitment to work full time at the station. (Communications Ex. 2, p. 1.)

14. Mr. Stoehr has over 20 years of broadcasting experience. From 1986 until recently, Mr. Stoehr was owner/operator and president of WQBQ-AM in Leesburg, Florida. While owner/operator and president of WQBQ-AM, Mr. Stoehr ran the sales and programming departments at the station. Mr. Stoehr sold the station on August 1, 1988. Prior to 1986, Mr. Stoehr was the general manager/sales manager/program director of WHBO(AM) in Tampa, Florida. Mr. Stoehr served as the sole owner/operator/general manager of WKIQ(AM), Inverness, Florida, in 1984. In 1985, he met Ms. Givens when buying WQBQ. (Tr. 98, 120.) He also owned and operated WAPR(AM) in Avon Park, Florida, in 1978, and WYBG(AM) in Massena, New York, in 1965. In addition to the foregoing, Mr. Stoehr has programming and announcing experience at KFRC(AM) in San Francisco, California; CKLW(AM) licensed to Windsor, Ontario, serving Detroit, Michigan; WIBG(AM) in Philadelphia, Pennsylvania; WMEX(AM) in Boston, Massachusetts; WGBS and WFUN in Miami, Florida; CHUM and CFTR in Toronto, Canada; and CFOX in Montreal, Canada. (Communications Ex. 2, p. 2.)

Thomas H. Poole, Sr.:

15. Mr. Poole is a black male. He currently resides at 1033 Smith Street, Eustis, Florida. He will move to Silver Springs, Florida, upon grant of the Communications application. (Communications Ex. 3, p. 1.)

16. If the Communications application is granted, Mr. Poole will serve full time as business manager of the station, and will work a minimum of 40 hours per week in that capacity. (Tr. 157.) Mr. Poole will terminate all other paid employment to satisfy that commitment. (Communications Ex. 3, p. 1.)

17. As business manager, Mr. Poole will oversee the business affairs of the station, including supervising the station's billing and accounting practices and cash flow of the station. (Tr. 156; Communications Ex. 3, p. 1.) Mr. Poole will oversee the station's operations, which includes accountability for billings and obligations. (Tr. 156.) Mr. Poole will also oversee the accounting and traffic departments. (Tr. 156-157; Communications Ex. 3, p. 1.) Mr. Poole will also be responsible for hiring and firing personnel and for the station's EEO program. (Tr. 157; Communications Ex. 3, p. 1.) Mr. Poole will report directly to Rosetta Givens, the station's general manager (Communications Ex. 3, p. 1.)

18. Mr. Poole has served as president of the NAACP of Florida since 1982, and has worked closely with the Ocala, Florida, branch of the NAACP. Mr. Poole was a speaker at the Fourth Annual Freedom Fund Dinner and the 1985 Fall Membership Kick-Off Campaign for the Marion County Branch of the NAACP, which is within the service area of the station. In 1987, Mr. Poole received an Appreciation Award from that branch. Mr. Poole is a member of the board of directors of the Lake Community Action Agency. He has been president of the Lake County Voters' League since 1977. For over ten years, Mr. Poole has served on the Governor of Florida's Statewide Commission on Human Relations. Mr. Poole also served on the Governor's Statewide Committee on Education from 1984 to 1987. (Communications Ex. 3, p. 2.)

Rosetta Givens:

19. Ms. Givens is a black female. She currently resides at 925 E. Line Street, Leesburg, Florida. Ms. Givens will move to Silver Springs, Florida, upon grant of the Communications application. If the Communications application is granted, Rosetta Givens will serve full time as general manager of the station, and will work a minimum of 40 hours per week in that capacity. Ms. Givens will terminate all other paid employment in order to satisfy that commitment. Ms. Givens will oversee the construction and operation of the proposed station and will direct its overall operations. The programming, administrative, promotional, and sales departments of the station's operations will be under Ms. Givens' supervision and ultimate authority. (Communications Ex. 4, pp. 1-2). Ms. Givens will supervise the station manager, business manager, news director and program director. (Tr. 84.) Ms. Givens, as general manager, "would oversee everything." (Tr. 105.)

20. Ms. Givens was employed at WZST(AM) (currently known as WQBQ(AM)) in Leesburg, Florida, from February 1973 to April 1986. She was initially hired as a secretary. Her duties included general office typing, traffic management, accounting, processing monthly reports, and commercials. After seven years at the station, in March 1980, Ms. Givens was promoted to the position of business manager where she had hands-on responsibility for all aspects of station operation and management, except on-the-air talent and engineering. Ms. Givens served for six years as the station's business manager. (Communications Ex. 4, pp. 1-2.)

21. Ms. Givens was a campaign committee member and worked in the Ocala area for Robert King High's campaign for Governor of Florida. Ms. Givens has also performed individually on a volunteer basis for special events in Ocala. (Communications Ex. 4, p. 2.)

22. Stoehr initially intended to file the application in his own name as Stoehr Communications, Inc. (Tr. 202.) Stoehr was sole stockholder in that company. (Tr. 203.) Upon learning of the FCC's minority preference policy, Stoehr sought to bring in minority partners in order to enhance his application. (Tr. 205.) Stoehr had always wanted an FM station and was willing to sacrifice complete ownership to enhance his chances of getting the station. (Tr. 233.)

23. Mr. Stoehr first attempted to recruit a black female, Bette Wimbish, sometime in May or June 1987. Ms. Wimbish owned a radio station in Madison, Florida. (Tr. 206.) However, Mr. Stoehr found her difficult to deal with and found that a partnership with her "wasn't workable." (Tr. 209.) Mr. Stoehr then contacted Thomas Poole, on about June 20, 1987, at the suggestion of Mr. Stoehr's wife, who knew Mr. Poole to be a leader in the black community of Leesburg, Florida. (Tr. 211.) Mr. Poole was previously acquainted with Mr. Stoehr because he had appeared on talk shows at WQBQ. (Tr. 156.)

24. Rosetta Given's name came up in a conversation between Mr. Stoehr and Mr. Poole in late June 1987. Mr. Stoehr had met her in 1985 when she was working at station WQBQ. (Tr. 213.)

25. Ms. Givens learned of the availability of the Silver Springs FM channel from Mr. Poole in a telephone call initiated by Mr. Poole on or about June 26, 1987. (Tr. 62-63.) The two then met at a restaurant and discussed the availability of the Silver Springs station. At that time, Ms. Givens was not told of the dollar investment she would have to make if the radio station were granted, nor did Mr. Poole explain to her what risk or exposure she would have by becoming a partner in Communications. (Tr. 63.)

26. Ms. Givens was not materially involved in the preparation of the application, the financial plan, or the selection of the transmitter site. (Tr. 75-76.) These matters were performed before she joined the partnership. She did not provide a personal financial statement to secure a financing letter for the proposed Silver Springs' station. Further, she had no understanding as to whether she would have to provide any collateral for any loan that is obtained from a bank. (Tr. 79.)

27. The Communications partnership agreement was drawn up by a Leesburg, Florida, attorney, Mary Beth Pullum. Ms. Pullum had served as Mr. Stoehr's attorney when he purchased the Leesburg station. (Tr. 215.) Poole and Stoehr retained Pullum to draft the partnership agreement. Communications counsel suggested that a partnership agreement be drawn. (Tr. 215.) Neither Stoehr nor Poole gave Pullum a written sample agreement which contained the basic terms to be embodied in the agreement. (Tr. 216.) Apparently, the attorneys wrote the docu-

ment and presented it to the partners. Mr. Stoehr signed the document on June 29, 1987. (Tr. 217-218.) Ms. Givens signed the partnership agreement on June 29, 1987. The document was brought to her at her office in the Florida HRS Department Building in Tavares, Florida, by Mr. Poole, who had already signed the agreement. Givens signed the partnership agreement without making changes or comments. (Tr. 64-65.)

28. Section 2.06 of the partnership agreement provides for dilution of any partner's interests in the event one partner does not pay his or her proportionate share of a capital contribution. (Tr. 66; Communications Ex. 1, 5 of 20 (Sec. 2.06).) Such additional contributions or advances by a partner shall be treated by the contributing partners as either a loan or a capital contribution, at their option. If treated as an additional capital contribution, the interests of all partners in the capital of the partnership and each partner's share of the profits and losses of the partnership shall be adjusted to correspond to each partner's recomputed interest in the partnership capital resulting from such additional capital contribution; and in the event the other partners shall elect to treat such advance as a loan to the partnership, such advance shall represent a debt from the partnership to the partner making such advance.

29. The partnership agreement further provides that the majority vote of the partners in capital interest, as defined at paragraph 2.01 of the agreement, shall govern the affairs of the partnership. Section 2.01 provides that the partnership capital contributions and ownership shall be equally held by Poole, Givens, and Stoehr. (Communications Ex. 1, p. 4 of 20, and Ex. 1 to Partnership Agreement (p. 13 of 20).) Thus far, Robert Stoehr and Thomas Poole have each contributed $12,500 to the capital of the partnership; Rosetta Givens has contributed $7,500 to the capital of the partnership. (Tr. 67-68.)

Diversification

30. Neither Communications (Communications Ex. 1, p. 1), nor the Messrs. Stoehr (Communications Ex. 2, p. 3), nor Poole (Communications Ex. 3, p. 2), nor Ms. Givens (Communications Ex. 4, p. 2), have any interest in any medium of mass communications.

A. P. WALTER, JR. - (WALTER)

Structure

31. Walter is an individual applicant for a new FM broadcast station at Silver Springs, Florida. If his application is granted, he will operate the station as a sole proprietorship and be the 100 percent owner of the station. (Walter Ex. 1, p. 1.)

Integration

32. In the event his application is granted, Walter proposes to serve full time, a minimum of 40 hours per week, on a day-to-day basis, as the general manager of his FM station at Silver Springs. As general manager, Walter will oversee all aspects of the station's operations, including programming, sales, business, and technical, will handle all financial affairs of the station and will make all hiring and firing decisions. (Walter Ex. 1, p. 1.)

33. Walter currently resides in Coral Gables, Florida (a suburb of Miami, Florida) which is outside the proposed station's primary service contour. In the event his application is granted, Walter proposes to relocate his residence to a point within the station's 1 mV/m (60 dBu contour). His family would move with him. Mr. Walter attended the University of Florida Law School in Gainesville, which is near the Ocala area (he achieved his J.D. degree in 1972). (Walter Ex. 1, p. 3.)

34. Mr. Walter is the sole owner of A. P. Walter, Jr., P.A., a Coral Gables, Florida, law office. Mr. Walter is a trial lawyer, and his present practice is primarily in the area of criminal defense work. He employs a three-person clerical staff. (Tr. 306.) Although he had no support associate at the time of the hearing, he was in the process of interviewing for that associate position. An associate of Walter had recently resigned. (Tr. 306-308.) He has no written retainer agreements or employment contracts calling upon him to provide his services for a continuing period to a given client or clients. He has practiced law since 1973. (Tr. 306.) In order to meet his integration commitment, should his application be granted, Walter would curtail his activities as a practicing attorney. (Walter Ex. 1, p. 2.)

35. Walter intends to continue his legal practice while managing the Silver Springs radio station. He intends to hire one or more associates to that end, and will "attempt" to take on only those cases which would be "compatible" with his proposed management of the station. Specifically, Walter's direct testimony is as follows:

> Mr. Walter would limit his activities as a practicing attorney to no more than 25 hours per week, which would be exceeded only in the event that, through circumstances beyond his control, a trial required more time than this. Mr. Walter would hire an associate or associates and sufficient clerical personnel to assist him. Mr. Walter would attempt to limit his practice only to those cases that would be compatible with his commitment to work a minimum of 40 hours per week at the Silver Springs FM station.
>
> (Walter Ex. 1, p. 2.)

36. Notwithstanding the above, Walter stated that he does not plan to be a practicing attorney in the event he obtains the Silver Springs allocation. (Tr. 307.) However, upon being confronted with his contradictory deposition and direct case testimony, Walter retracted his initial statement and testified that he would continue to take on "interesting" cases, and also would continue to represent current clients while he was "winding down." (Tr. 310-312.)

37. Walter also initially testified that he would not open a law practice in the Silver Springs area. (Tr. 307.) This testimony, however, is in direct contradiction to his own direct case testimony in which he stated his intention to ". . . establish an office in the Silver Springs-Ocala area." (Walter Ex. 1, p. 2.) Furthermore, Walter has already envisioned having a name on the door as well as stationery for the law office. (Tr. 346.) In any event, Walter enjoys being a lawyer and sees himself working on at least one "interesting" case a year out of the Ocala law office. (Tr. 348-349; Radio Ex. 6, p. 75.)

38. Walter has discussed with his two law secretaries the possibility of them working at his new law practice in Ocala. (Tr. 341.) Later, Walter tried to imply that what he

had discussed with the secretaries was their working at the radio station, rather than the Ocala law practice. (Tr. 342-343.)

39. Walter's Ocala office may attempt to represent the station in furnishing legal opinions or legal representations. This may take 25 hours a week of his time. (Tr. 345, 351.)

40. Walter's case load, at time of hearing, involved a pending trial as well as appeals before the Fifth, Sixth and Eleventh Circuits, as well as the United States Supreme Court. (Tr. 316.) Walter's case load frequently takes him out-of-state, requiring him to go as far as California and Nevada. (Tr. 318, 328.) The time it takes Walter outside of his office to service his clients vary from three or four days up to two weeks at a time. (Tr. 334, 337.) In the event of a conflict, Walter's legal clients will take precedent over his radio station business. (Radio Ex. 6, pp. 78-79.)

41. Communications counsel first informed Walter of the availability of the radio station frequency at Silver Springs, Florida. (Tr. 300.) Walter did not personally contact the owner of his proposed site, leaving that task to be performed by a consulting firm. (Tr. 302-303.) Counsel selected and hired the firm. (Tr. 303.) Walter did not select or hire the engineer and did not know the name of the engineer at the time of hearing. (Tr. 303.) The application was prepared by counsel based on information furnished by Walter on the telephone. (Tr. 303-304.) The public inspection file was established by counsel who also published the notice of the designation of the case for hearing. (Tr. 304, 321.)

Diversification

42. Other than pending applications for new FM stations at Panama City Beach, Florida, and Englewood, Florida, A. P. Walter, Jr., has no interest, direct or indirect, in any broadcast radio or television station, low power television station, newspaper, magazine, other periodical, outdoor advertising company, advertising agency, media sales representative firm or broadcast network. (Walter Ex. 1, p. 1.)

Auxiliary Power

43. Mr. Walter proposes to install auxiliary power generating equipment at both the transmitter and studio locations to permit continued operation of the proposed station in the event of commercial power failure. (Walter Ex. 1, p. 3.)

SILVER SPRINGS RADIO COMMUNICATIONS, LTD. - (Radio)

Structure

44. Radio is a limited partnership organized under the laws of the State of Florida. Radio has one general partner, Ms. Patricia Gaskin, who holds a 25 percent equity interest in the partnership, and two limited partners. The limited partners are John B. Adams, who has a 15 percent equity interest in the partnership, and his brother, Richard H. Adams, Jr., who has a 60 percent equity interest. (Radio Ex. 1, p. 1.)

Integration

45. Ms. Gaskin proposes to be the general manager of the radio station and to work full time at that position on a daily basis averaging at least 40 hours per week. (Radio Ex. 2, p. 1.) Ms. Gaskin is a black woman, born on June 18, 1961, in Miami, Florida. She lived in Miami for five years until she and her family moved to Punta Gorda, Florida. Ms. Gaskin, a high school graduate, lived in Punta Gorda until 1986. Ms. Gaskin then moved to Ocala and has rented an apartment in that city for about three years. (Tr. 367.) She lives within the 1 mV/m contour of the proposed station.

46. Ms. Gaskin's duties at the radio station will include sole responsibility for selecting, hiring, and terminating staff at the station. (Tr. 383; Radio Ex. 2.) Ms. Gaskin's responsibilities will also include selecting programming, ascertaining and responding to community needs, concerns and problems, approving budgets, and all other management and operating procedures at the station. (Tr. 383, 415-416; Radio Ex. 2.)

47. Ms. Gaskin has been employed for a mobile home manufacturer (Phillips Industries) in a department which makes parts for windows and doors. (Tr. 379.) She has never owned a business. (Tr. 368.) Ms. Gaskin did not attend college, has never worked at a radio station, and has never taken any courses in journalism or broadcasting. (Tr. 367.) Upon grant of the Radio application, Ms. Gaskin will terminate her present position with Phillips Industries in order to fulfill her commitment to work at the proposed station on a full time basis. (Radio Ex. 2.)

48. About a year before the filing of the Radio application, the Commission opened a filing window for the Silver Springs station which it subsequently rescinded due to a short-spacing problem. (Walter Ex. 7, p. 12.) Pursuant to that 1986 window, John and Richard Adams, the limited partners in Radio, had begun work on some of the details of the application. At that time, they contacted George Pasteur, the owner of the land now specified in Radio's application as the transmitter site. (Walter Ex. 7, pp. 12-14.) Ms. Gaskin learned of the availability of Channel 238A after John Adams contacted and met with her and advised her of the availability of the station. Ms. Gaskin had never met John Adams prior to the meeting. (Tr. 368.) John Adams told Ms. Gaskin that he and his brother were looking for a black female to be a part of their application at their first face-to-face meeting on June 22, 1987. (Tr. 369.) Ms. Gaskin was referred to the Adams brothers by a Darie Hamilton of Punta Gorda, Florida, a long-time friend of Ms. Gaskin. Ms. Hamilton was the general partner and Richard Adams was a limited partner in the application of 105.3, Ltd., for a new FM station in Solana, Florida, a community in close proximity to Punta Gorda. (Tr. 369-370.)

49. The two limited partners of Radio are both white males. John B. Adams is a lifelong resident of Ocala. He is a landscape architect, a graduate of the University of Florida, and a land developer. He is interested in the Silver Springs FM station because he lives in the area, and the station would enhance his image in the local community. (Walter Ex. 7, pp. 4-6.) Prior to the Silver Springs application, John Adams had never been a non-voting stockholder or limited partner in a business venture. (Walter Ex. 7, p. 33.)

50. Richard H. "Dick" Adams, Jr., the brother of John B. Adams, is a University of Florida Law School graduate, a partner in an Orlando law firm, and a participant in a

number of other FCC broadcast applications, *i.e.*, a television application for Orlando; FM applications at Orlando, Solana, and Rockledge, Florida. (Walter Ex. 6, pp. 4-13.)

51. Prior to the filing of the Radio application, Richard Adams already had a relationship with attorney Robert Buenzle, lead counsel for Radio, from prior applications for Solana and Rockledge, Florida. (Walter Ex. 6, pp. 12-15, 36-37.) John Adams referred Ms. Gaskin to Mr. Buenzle. (Walter Ex. 7, p. 75.) Bills from Mr. Buenzle are sent not only to Ms. Gaskin, but also to the two Adams brothers. When Radio hired Mr. Buenzle, Ms. Gaskin showed the two Adams brothers the proposed retainer agreement; it was only after they agreed to the terms therein that she signed it. (Tr. 409-410.) Richard Adams receives copies of letters from counsel to Gaskin. (Walter Ex. 6, pp. 94-95.) He also has communicated with Mr. Buenzle about the case following the filing of the application. (Walter Ex. 6, p. 100.)

52. The Adams brothers knew of the minority/female preferences in Commission comparative cases as early as 1986, and the decision to look for a minority female partner was made upon the advice of counsel. (Walter Ex. 7, 9.)

53. Financing for the application was obtained after John Adams arranged a meeting at the Sun Bank of Ocala, N.A., on approximately June 25, 1987. Prior thereto, Ms. Gaskin had never banked with Sun Bank. (Tr. 371-373.) John Adams introduced Ms. Gaskin to Maurice Murphy, Executive Vice-President of the Sun Bank of Ocala. (Walter Ex. 7, pp. 20-21.) Ms. Gaskin did not attempt to use any other bank for financing. (Tr. 372.)

54. A meeting was held on June 29, 1987, at the law office of Richard Adams in Orlando, Florida. In attendance were, *inter alia*, Richard Adams, John Adams, Patricia Gaskin and Robert Buenzle. (Walter Ex. 7, pp. 98-99.) This was the first time Richard Adams had ever met Ms. Gaskin. (Walter Ex. 6, p. 101.) On that day, the Radio limited partnership agreement, which was prepared by Buenzle, was executed and the FCC application was completed and signed. The agreement was similar to the limited partnership agreement used by Richard Adams in other cases, including the Highlands Communications, Ltd., application for Orlando. (Walter Exs. 1, 2, 3, and 6.) This particular agreement was not seen by the partners before June 29, 1987, and no changes were made before it was signed. (Walter Ex. 7, p. 15.) It had been decided by the Adams brothers prior to this meeting that John Adams could have as much equity as he could handle, Ms. Gaskin could have 25 percent, and Richard Adams would take the remainder. (Walter Ex. 6, p. 67; Walter Ex. 7, p. 103.)

55. According to Ms. Gaskin, she went over the partnership agreement with counsel and personally filled out the application. (Tr. 399-400.) Ms. Gaskin also filled out the EEO form in the Radio application and named the various organizations listed there. (Tr. 401-402.) At the suggestion of Mr. Buenzle, Ms. Gaskin chose the engineer. The site selected by Radio was the same site that John Adams had previously identified (Tr. 410-411), and Adams accompanied Gaskin to meet the landowner to discuss the site. (Walter Ex. 7, p. 92.) Ms. Gaskin performed the newspaper publication of the filing of the application and the designation of the case for hearing. (Tr. 411-412.) Ms. Gaskin maintains the partnership checking account and pays the bills of the partnership as they come due. (Tr. 395-396.) Copies of the bills, as previously noted, are sent to Richard and John Adams. (Tr. 396.) If additional funds are needed, Ms. Gaskin makes a written capital call on her limited partners. (Tr. 396.)

56. It was agreed that Patricia Gaskin would be obligated for a $10,000 capital contribution; that John Adams would be obligated for a $6,000 capital contribution and a $32,000 loan to Radio; and Richard Adams would be obligated for a $24,000 capital contribution and a $128,000 loan to Radio. (Radio Ex. 5, pp. 4-5; Walter Ex. 6, pp. 70-71.) The 25 percent equity share and the $10,000 capital contribution were first presented to Ms. Gaskin on June 29, 1987. (Walter Ex. 7, pp. 103-104.) Richard Adams knew from the start that Patricia Gaskin could not meet her $10,000 obligation. (Walter Ex. 6, p. 79.) Richard Adams paid the initial $1,800 FCC filing fee out of his own checking account. (Walter Ex. 6, pp. 83-84; Walter Ex. 7, p. 108.)

57. John and Richard Adams arranged and negotiated a $10,000 loan for Ms. Gaskin from the Sun Bank of Ocala in order to enable her to make her capital contribution. Both men executed a guarantee for the loan. (Tr. 374.) This loan was obtained on October 23, 1987. (Walter Ex. 7, p. 23.) Other than the funds from this loan, Ms. Gaskin has not contributed any other funds for the project. (Tr. 377.) No principal on the bank loan has yet been repaid, and interest payments have come from the Radio account, which has been funded by the contributions of Richard and John Adams and the bank loan. Ms. Gaskin has not attempted to repay principal or interest from her own funds. (Tr. 378.) The loan is a demand loan, and Ms. Gaskin has no understanding as to when the loan might be called. She was unable, at the time of the hearing, to repay the loan. (Tr. 375.)

58. The Radio limited partnership agreement calls for a division of profits and losses as follows: Patricia Gaskin, 25 percent; John Adams, 15 percent; and Richard Adams, 60 percent. (Radio Ex. 5, Sec. 8 (p. 6).) The agreement further provides that "the partnership shall be the exclusive province and control of the General Partner alone and that no Limited Partner may participate or seek to participate in any manner or way in such control or operation of the partnership or any television station operated by the Partnership." (Radio Ex. 5, Sec. 13 (p. 8).)

Diversification

59. Neither the general partner nor either of the limited partners of Radio have any ownership of any other existing radio, television, newspaper, cable or other media of mass communication in Silver Springs, Florida, or elsewhere. Richard Adams has limited partnership interests in an application for a new television station at Orlando, Florida, and applications for new FM stations at Solana and at Rockledge, Florida. (Radio Ex. 3, p. 1.)

Auxiliary Power

60. Radio has proposed the use of an auxiliary power supply with respect to its proposed facilities. (Radio Ex. 4.)

FINANCIAL ISSUE RE : Radio

61. Because questions had been raised regarding the creditworthiness of the general partner of Radio and the availability of a bank loan upon which the applicant was relying for its financial qualifications, a financial issue was specified. The issue involves two areas of inquiry: (1)

whether Radio is presently financially qualified, and (2) whether its initial certification constitutes misrepresentation. Subsumed under the issue are questions regarding the validity of the bank loan letter, and whether it was *bona fide* or merely an accommodation.

62. As previously noted, Radio is a limited partnership with Ms. Gaskin being the general partner with a 25 percent equity interest, and John and Richard Adams being the limited partners with a combined 75 percent equity interest. In May or June 1987, John Adams approached Maurice Murphy, the Executive Vice-President of Sun Bank of Ocala (Sun Bank) to inquire about obtaining financing for Radio's proposed FM station in Silver Springs. (Radio Ex. 2-4, paragraph 3 (p. 1).) Murphy had been employed by the Sun Bank since 1973, and has been the Executive Vice-President since 1985. John Adams and Mr. Murphy have a long-standing business relationship.[2] (Tr. 674.) In June 1987, Patricia Gaskin and John Adams met with Mr. Murphy to discuss financing for the FM facility. (Radio Ex. 2-4, p. 1.) John Adams arranged the meeting which lasted approximately 45-60 minutes. (Tr. 420, 603-604, 612.) Ms. Gaskin and Mr. Murphy reviewed the proposal in general and discussed the time that might elapse before authorization could be expected. (Radio Ex. 2-4, para. 4 (p. 1).) Ms. Gaskin did not give Mr. Murphy a personal financial statement for herself or a loan application. (Tr. 605-606.) However, the Bank had on file personal financial statements of both John and Richard Adams, and Murphy knew the financial strength of the individuals involved. (Tr. 547, 575, 692, 741.) Ms. Gaskin was not sure whether she left any documents with Mr. Murphy relating to the proposed FM station. [3] (Tr. 607.) Ms. Gaskin returned to the bank "a couple of days later" to pick up a bank letter. (Tr. 612.)

63. The bank letter, above Mr. Murphy's signature, is dated June 25, 1987, and is as follows[4]:

> Dear Ms. Gaskin:
>
> We are pleased to review your proposal to construct and operate a new FM station in Silver Springs, Florida and based upon that review further state that in the event that the Federal Communications Commission grants your application for the required construction permit for that station, we would be willing to extend to Patricia A. Gaskin a line of credit up to $500,000.00 upon the general terms and conditions set forth below.
>
> The loan shall be made for a period of 5 years at a rate of interest 2% above the prime rate per annum in effect at the time that any portion of the loan is taken down. The loan shall be retired by the payment of quarterly installments of principal and interest each year during the 5 year term of the loan. It is agreed, however, that no principal payments will be required during the first twelve (12) months of the loan period, during which time you will only be required to make the appropriate quarterly payments of interest.
>
> We are personally acquainted with you and your proposal and also with the fact that a determination of grant of the construction permit for this station may take up to three years. As such, you understand that although it is our present firm desire and intention to make this loan on the terms and conditions as stated above, this letter cannot represent a legally binding commitment, and final funding of the loan must be subject to future conditions in effect at the time of funding and final approval by the bank loan committee at that time. Upon such documentation customary for such loan and would require a normal security interest in the station's physical assets as collateral to secure the loan.
>
> We wish you the best of fortune in seeking this new FM station to service Silver Springs and hope that we may serve you soon.
>
> (Radio Ex. 2-1, Att. A, pp. 8-9.)

64. The June 25, 1987, letter from Mr. Murphy to Ms. Gaskin was based on a draft of a suggested bank letter received from attorney Robert Buenzle. (Tr. 610.) The letter, however, was a combination of Murphy's words and the language suggested in the draft letter. (Tr. 676.) Ms. Gaskin never inquired of Mr. Buenzle what specific items were required to be in the bank letter. (Tr. 617-618.) The draft letter Ms. Gaskin received from Mr. Buenzle did not make any reference to a requirement that personal guarantees be provided by John and Richard Adams. (Tr. 624.) Ms. Gaskin knew that her own personal credit position would not have qualified her, alone, for a loan of $500,000. (Tr. 645.) She also knew that the Sun Bank of Ocala knew of the reliability of her limited partners, which eliminated the need for the bank to direct its attention to her personal credit position. (Tr. 645.)

65. Had Patricia Gaskin come into the Sun Bank in June 1987 without John Adams, Mr. Murphy would not have issued a loan letter to her. (Tr. 674.) On the other hand, had John Adams come into the Sun Bank of Ocala without Ms. Gaskin, Mr. Murphy would have written a reasonable assurance letter for him. (Tr. 685.) Although Mr. Murphy knew the value of radio stations in the Ocala area, the reason that a loan to Radio would have been made was because of the resources of John and Richard Adams. (Tr. 675.) The letter that was written, as noted, was written by Mr. Murphy on the strength of the financial position of the Adams brothers. (Tr. 685.)

66. Although initially never asked by the bank, the principals of Radio each expected that they would have to lend their personal guarantees to the actual loan at some point in the future. Richard Adams was not asked to provide his personal guarantee, and he did not volunteer it. (Tr. 549-550.) He expected to be asked for his personal guarantee, although he also understood that it was not impossible in a case involving a valuable radio property for a loan to be extended on a non-recourse basis. (Tr. 554-555.) Richard Adams expressed no unwillingness to give his personal guarantee. (Tr. 561.) Like her partners, Ms. Gaskin understood in her own mind that it was reasonable to believe that guarantees would be necessary when the formal loan was made. (Tr. 652.) While Mr. Murphy would have required the personal guarantees of all the principals at the time of making the actual loan, he did not feel it was necessary to obtain those guarantees until the final loan was made some three years in the future. (Tr. 712.) Thus, no provisions relating to the guarantees of the limited partners were included in the bank letter.

67. Mr. Murphy was of the view that the bank letter was addressed to the partnership, Silver Springs Radio Communications, Ltd., and not to Ms. Gaskin personally. (Tr. 712-713.) The line of credit would be extended to Radio, and Ms. Gaskin would sign as the general partner of the partnership. (Tr. 713-714.) Thus, the letter is addressed to Ms. Gaskin as principal of the partnership as follows:

> Ms. Patricia A. Gaskin
>
> Silver Springs Radio Communications, Ltd.
>
> (Radio Ex. 2-1, Att. A, p. 8.)

Mr. Murphy acknowledges that the letter could have been written more clearly, but nevertheless voiced the opinion that the letter did not necessarily create the impression that the loan was to Ms. Gaskin personally. (Tr. 713-714.) In any event, the intent of Murphy was to loan money to the partnership, and that was what he was trying to imply in the letter. (Tr. 715.)

68. The Sun Bank had several reasons for issuing a bank letter to provide financing for the station proposed by Radio. (Radio Ex. 2-4, paragraph 6 (p. 3).) Those reasons included the following:

> 1. The bank was actively trying to increase its loan portfolio;
>
> 2. The bank was aware of the substantial value that attached to FM radio stations as well as their impact in the community;
>
> 3. The station would be local in terms of the bank;
>
> 4. Two of the three principals were local residents in terms of the bank;
>
> 5. One of the principals was a local businessman who had been a continuous customer of the bank for at least 16 years;
>
> 6. One member of the group was a prominent Orlando attorney.
>
> (Radio Ex. 2-4, para. 6 (p. 3).)

69. According to Mr. Murphy, the Sun Bank is in a very competitive market in making loans. The Radio proposal looked like an opportunity that the bank wanted to pursue. (Tr. 675.) In addition, Mr. Murphy was fully aware of the substantial value of a radio station. (Tr. 674-675, 682.) He was personally aware of a local station that had only recently been sold in that market for approximately $4,000,000. (Tr. 695; Radio Ex. 2-4, para. 5 (p. 3).) That station was believed to have been WFUZ. Furthermore, although he did not know the precise procedures involved, Mr. Murphy knew that as debtor-in-possession of the station's assets, the license could be assigned in the event of a default by Radio. (Tr. 679-680.)

70. On June 30, 1987, Radio filed its application for the FM station at Silver Springs. Patricia Gaskin, on behalf of the applicant, certified that Radio was financially qualified to construct and operate the station for three months without revenue. According to Ms. Gaskin, she had no reason to doubt the original bank commitment letter. (Radio Ex. 2-1, para. 3 (p. 1).) John Adams had no reason to question the *bona fides* and total legitimacy and reliability of the Sun Bank letter. (Radio Ex. 2-2, para. 7 (p. 3).) Also, Richard Adams believed the commitment letter of the Sun Bank was *bona fide* and genuine, and that it was properly relied upon by the principals at the time the application was prepared and filed with the FCC. (Radio Ex. 2-3, para. 5 (p. 2).)

71. On September 29, 1988, a judgment was rendered against Patricia Gaskin for payment of a $1,013 debt to Budget Rent-a-Car. This judgment remained unpaid until shortly before hearing on the financial issue, when it was satisfied by Ms. Gaskin with the proceeds from an income tax refund. (Tr. 628.) On April 12, 1989, Mr. Murphy issued a letter to Patricia Gaskin informing her of his knowledge of the judgment against her by Budget Rent-a-Car and confirmed that the letter of June 25, 1987, "remain[ed] in full force and effect." (Radio Ex. 2-1, Att. B, p. 11.) The letter of April 12, 1989, also inserted one further provision to the letter of June 25, 1987 that "[the bank] anticipate[s] the additional requirement of personal guarantees of all partners of Silver Springs Radio Communications, Ltd. (i.e. you as General Partner along with both of your Limited Partners) for any such loan undertaken." (*Id.*) On April 19, 1989, Patricia Gaskin, John Adams and Richard H. Adams all executed a letter to the Sun Bank of Ocala, agreeing to provide their personal guarantees. (Radio Ex. 2-1, Att. C, p. 14.)

SILVER RADIO PARTNERS - (Silver)

Structure

72. Silver is a Florida general partnership. Michael J. Wilhelm is general partner and 50 percent equity owner. Philip Rubin is general partner and 25 percent equity owner. Robert Bednarek is general partner and 25 percent equity owner. (Silver Ex. 1.)

Integration

73. Silver proposes no integration of ownership with management. (Silver Ex. 3.)

Diversification

74. Neither Silver, nor the partners, have cognizable media interests. (Silver Ex. 2.)

Auxiliary Power

75. Silver proposes auxiliary power generation equipment. (Silver Ex. 4.)

ULTIMATE FINDINGS AND CONCLUSIONS

76. This proceeding presently involves four mutually exclusive applicants seeking a construction permit to build a new FM station in Silver Springs, Florida. There are no basic qualifying issues outstanding against the applicants except for a financial/misrepresentation issue specified against Silver Springs Radio Communications, Ltd. (Radio). Because only basically qualified applicants are entitled to comparative consideration,[5] the financial/misrepresentation issue specified against Radio will be considered and resolved before a comparative evaluation of the competing applicants will be undertaken.

77. Resolution of the financial/misrepresentation issue depends on the validity and *bona fides* of the bank letter upon which Radio relies for its financial qualifications.

Questions regarding the bank letter were raised because of the apparent lack of creditworthiness of the general partner of Radio. However, based primarily on the testimony of the banker who issued the letter to Radio, the Presiding Judge will resolve the financial/ misrepresentation issue in favor of Radio.

78. Radio obtained a letter from the Sun Bank of Ocala which stated the bank was "willing to extend to Patricia A. Gaskin a line of credit up to $500,000 . . " While the bank letter failed to state that the personal guarantees of both limited partners of Radio would be required, it was the understanding and belief of the limited partners, as well as the banker, that such personal guarantees would be needed to secure the loan. The bank has since clarified its letter to make clear that the personal guarantees of the limited partners would be required, and both limited partners have stated their intentions to guarantee the loan. Based on the Findings, Radio has reasonable assurance of the availability of a bank loan of $500,000 and is financially qualified to build and operate its proposed station.

79. The question of whether Radio's financial certification constituted misrepresentation was raised because of allegations that the bank letter was not a sincere and *bona fide* bank letter, but rather was issued as an accommodation to Radio. If, indeed, the bank letter was merely an accommodation with no intent on the part of the bank to provide Radio with reasonable assurance of the availability of the funds, and if Radio certified to its financial qualifications knowing the bank letter was an "accommodation," then clearly the certification would have to be considered a misrepresentation.

80. The bank letter was issued by Mr. Murphy, the banker, based on his knowledge of the value of an FM station in the market and the creditworthiness of the limited partners of Radio. Mr. Murphy, in his testimony, gave other persuasive reasons why he is interested in making the loan to Radio. (*See*, paragraph 68 of Findings.) Based on the Findings and the testimony of Mr. Murphy, the Presiding Judge concludes that the bank letter was not a mere accommodation letter, but rather a *bona fide* letter issued by the bank providing the applicant with reasonable assurance of the availability of funds. The original letter was deficient because of its failure to make clear that the loan was to the partnership (not to the general partner individually), and that the personal guarantees of the limited partners would be required. The failure of the letter, in these respects, raised questions as to the *bona fides* of the letter because Radio's general partner did not have the creditworthiness which would have justified a $500,000 loan without the personal guarantees of the limited partners. *Merrimack Valley Broadcasting, Inc.*, 82 FCC 2d 166 (1980). These questions have been resolved by the testimony of Mr. Murphy. Walter argues that the bank letter issued by Murphy was an accommodation letter at the same time that Walter states that Mr. Murphy was a "most credible witness." Having found Murphy to be a "most credible witness," it is incomprehensible and incongruous to thereafter argue that the bank letter was an accommodation letter, because Murphy's testimony makes clear that the bank letter was a *bona fide* and sincere expression of the bank's interest in making the loan to Radio. It is thus apparent that the applicant properly relied upon this letter in certifying its financial qualifications and, in doing so, committed no misrepresentation. The argument that the bank letter was an accommodation letter is rejected, and the issue is resolved in favor of Radio. Therefore, Radio is not disqualified and is entitled to comparative consideration in this proceeding.

81. The comparative evaluation of mutually exclusive broadcast applications is governed by the Commission's 1965 *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393. Therein, the Commission established the primary objectives toward which the process of comparison should be directed. They are (1) a maximum diffusion of control of the media of mass communications, and (2) the best practicable service. In determining which applicant will insure the best practicable service to the public, the Commission, in its *Policy Statement on Comparative Broadcast Hearings*, stated that consideration must be given to the degree of integration of ownership and management and to the attributes of the participating owners -- including such matters as broadcast experience, local residence and past participation in civic affairs. Participation in station operation by owners is considered by the Commission to be a factor of substantial importance because, "[i]t is inherently desirable that legal responsibility and day-to-day performance be closely associated." *Policy Statement*, *supra*, at 395. Full time, or almost full time, participation in station operation by owners is of primary interest, particularly when coupled with local residence, broadcast experience and past participation in civic affairs. Part-time participation is of lesser importance. Indeed, it has previously been held that participation of less than 20 hours per week is not entitled to integration credit. *Midwest Broadcasting Company*, 70 FCC 2d 1489 (1979).

Diversification

82. None of the applicants or their respective principals have media interests cognizable under the diversification criteria. Therefore, all applicants are equal on this important comparative factor, and the case must turn on the "best practicable service" aspect of the comparative issue.

Integration

83. Communications, Walter and Radio each claim 100 percent integration credit. Communications' claim is based on its proposal to integrate all three of its general partners into full-time management positions at the station. Walter claims 100 percent integration credit on his proposal to integrate full time as the general manager of his proposed station, and Radio claims 100 percent integration credit on the basis of its limited partnership structure, whereby its sole general partner and 25 percent equity owner will be integrated full time as the station's general manager. Silver claims no integration credit and is entitled to none.

84. Communications' claim for 100 percent integration credit is challenged for several reasons. It is argued that Givens and Poole were passive participants in the applicant; that Stoehr was the moving force in the origination and preparation of the Communications application; that Poole and Stoehr have contributed more funds to the applicant than Givens; that the arrangement concerning Poole, Givens and Stoehr is a sham and does not represent a *bona fide* business arrangement[6]; that Stoehr, because of his background and experience, and not Givens, will be the general manager of the station.

85. It is clear that Stoehr was the moving force in the Communications application. Indeed, at one time Stoehr was going to file as sole owner, but in an effort to improve his comparative chances, he decided to sacrifice his sole ownership interest. Thus, the general partnership form of business enterprise was used, and Poole and Givens, both black, were added by Stoehr as equal partners to enhance the comparative position of the applicant. There is nothing wrong with this provided the applicant is *bona fide* and does not represent a sham arrangement without substance.

86. Each of the three general partners of Communications contributed $7,500 of their own money to the partnership. Thereafter, both Poole and Stoehr each contributed an additional $5,000. If Givens does not match this contribution, her percentage of profits and losses will be adjusted to her proportionate contribution. Clearly, all partners in Communications have contributed sizeable sums of money and each must be considered a true and actual owner. *See, KIST Corp.*, 102 FCC 2d 288 (1985), *affirmed*, 801 F. 2d 1436 (D.C. Cir. 1986).

87. Also, while the designation of Givens as general manager is criticized, it is noted that Givens is not a novice to broadcasting. She was employed by WQBQ(AM) for more than fifteen years, six years of which she served as the business manager of the station with significant duties and responsibilities. Thus, while Stoehr's broadcast experience may be considered superior to Givens, nevertheless, the designation of Givens as the proposed general manager cannot be viewed as superficial or a sham.

88. It is further argued that because Stoehr and Poole have made greater financial contributions than Givens ($12,500 to $7,500), the voting rights of Givens has thereby been diminished, and she no longer enjoys a one-third voting interest. However, the partnership agreement relied upon to support this agreement appears to relate to the sharing of profits and losses and not voting rights. (*See*, paragraphs 28 and 29 of Findings.) In any event, because all three of the partners are to be integrated into important management positions, even if the partnership agreement is somehow viewed as diminishing Givens' voting rights because she has not financially contributed as much as Stoehr and Poole,[7] this would not affect the 100 percent integration credit to which the applicant is entitled.

89. In summary, Communications will be awarded 100 percent full-time integration credit for its proposal to integrate Givens, Poole and Stoehr into the management of the station. The arguments of the other applicants are speculative, unsupported, and unpersuasive. Communications' integration credit is enhanced by two-thirds minority ownership, one-third of which is also female ownership. Additionally, Communications' integration credit is enhanced by the long time broadcast experience of Stoehr and Givens, as well as the proposal of all three partners to move to Silver Springs. Finally, Communications receives credit for Poole's civic activities. While some of these activities appear to be more of a state-wide nature, rather than strictly local involving the proposed service area, they are nevertheless entitled to some credit.

A. P. WALTER, JR. (Walter)

90. While Walter claims 100 percent integration credit, such proposal cannot be credited primarily because of the confusing, contradictory and inconsistent testimony offered by Walter. Specifically, Walter is a practicing attorney in Coral Gables, Florida, and his direct case written testimony indicates his intention to establish a law practice in Silver Springs. While it is his intention to limit his practice to not more than 25 hours per week, he stated that the 25 hours would be exceeded if a "trial required more time than this." Also, the direct case presented by Walter represented that Walter would merely "attempt to limit his practice only to those cases that would be compatible with his commitment to work a minimum of 40 hours per week . . " Furthermore, the direct written case submitted by Walter reflects that a fully staffed law office will be established by Walter in Silver Springs. Moreover, Walter intends to legally represent the station himself, and that this part of his practice alone "might take outside of 25 hours a week."

91. The direct written testimony submitted by Walter was contradicted by him in his oral testimony at the hearing. (*See*, paragraphs 36-39 of the Findings.) Indeed, Walter's testimony, when considered in its totality, is confusing, contradictory, and inconsistent. He has not set forth a specific integration proposal from which he has not departed. Nor has he provided reasonable assurance that the proposal will be carried out. *Bradley, Hand and Triplett*, 89 FCC 2d 657 (1982). "It is well settled Commission precedent that persons seeking participation credit must make a *persuasive* showing as to how they will accommodate their outside professional business activities so as to fulfill their specific commitments to the proposed station." (Emphasis in original.) *Stanly Group Broadcasting, Inc.*, 3 FCC Rcd 5017, 5020-5021 (1988). Rather than making a persuasive showing, Walter's conflicting and inconsistent testimony provides little assurance that he has given adequate consideration to fulfilling his integration proposal in light of his professional responsibilities. In this respect, Walter is in no better position from an integration standpoint than the professionals in *Leininger - Geddes Partnership*, 2 FCC Rcd 3199 (1987) or *Stanly Group Broadcasting, Inc.*, cited *supra*.

92. Walter's reliance on *White Mountain FM, Inc.*, 94 FCC 2d 1423 (1983) is misplaced. In *White Mountain*, the attorney's practice consisted of only 25 hours per week which he intended to reduce to 10 to 15 hours per week, and he also promised to resign his other part-time position. It was held that the showing made was "uncontradicted and unrebutted," that the integration proposal was set forth in some detail, and that the principal's time was specifically allocated to accommodate his outside interests in order to effectuate the integration proposal. Here, however, as previously noted, Walter's showing is confusing and contradictory and not entitled to the 100 percent integration credit claimed. At most, on the basis of the Findings, Walter is only entitled to part-time integration credit. Such credit is enhanced by Walter's proposal to move to the service area. Walter also receives credit for his proposal to install auxiliary power.

SILVER SPRINGS RADIO COMMUNICATIONS, LTD. (Radio)

93. Radio, as noted, is a limited partnership and seeks 100 percent integration credit for its proposal to integrate its general partner and 25 percent equity owner into the management of the station as the full-time general manager. However, the initiation and formation of Radio as a limited partnership follows an all too familiar pattern. In this connection, the idea to file the application originated

with the limited partners, John and Richard Adams, who are white males. They recruited the general partner, Patricia Gaskin, a black female, who was a total stranger, and who met John Adams for the first time a few days before the application was filed. A meeting with Richard Adams and counsel, who previously represented Richard Adams in other broadcast applications, was arranged, at which time a limited partnership agreement was executed and the FCC application completed and signed. Gaskin was designated the general partner and was offered a 25 percent equity interest. Richard Adams, who has a 60 percent equity interest, had never met or spoken to Ms. Gaskin prior to June 29, 1987, at which time the partnership agreement was executed. Communications counsel was referred to Gaskin by John Adams, but, as previously noted, this same counsel had previously represented Richard Adams in other broadcast applications.

94. The limited partners have had a pervasive influence in the initiation, preparation, and prosecution of the Radio application. They decided on the business form of the applicant; recommended the communications counsel to be used; they recruited the general partner, a total stranger, who had no past broadcast or business experience; they dictated the equity she could have; they provided or arranged for all of the funds for the partnership even to the extent of guaranteeing a $10.000 bank loan so the general partner could make her capital contribution; participated in securing the bank financing upon which the financial qualifications of the applicant is based; selected and participated in securing the transmitter site; receive courtesy copies of all bills and copies of correspondence between counsel and Ms. Gaskin; and Richard Adams communicates directly with communications counsel.

95. It is clear that the limited partners have not been entirely "passive" in their involvement in the partnership, and it is entirely unlikely that they will be passive following the award of a construction permit. While the Commission in *Victory Media, Inc.*, 3 FCC Rcd 2073 (1988) tended to de-emphasize the pre-organizational activities of the alleged "passive" investors in evaluating the *bona fides* of the applicant stating such activities are "not necessarily dispositive," there is actually little else to look to or consider in determining who will control or exert influence on the partnership and its business. Here, in considering the totality of the record evidence, it appears that the general partner has not made any important decisions without the participation of the limited partners. The selection of the site; the structure of the applicant; the equity split; the selection of communications counsel and the engineer; the bank selected for financing were all matters which were handled by the limited partners. The general partner did nothing but follow the lead of the limited partners and acquiesced in their decisions in all these matters. Even the retainer agreement of counsel was approved by the limited partners before it was entered into by the general partner. In view of this involvement on the part of the limited partners, it is difficult to imagine that such participation will cease. This is particularly the case because the general partner selected was a total stranger who has no broadcast or business experience. While the lack of broadcast experience is remedial, the absence of any kind of business as well as broadcast experience does not instill confidence in the claim that Ms. Gaskin will exercise sole control over the partnership and its business to the exclusion of any influence or input by the limited partners. It is completely naive to believe that the limited partners, who are professional experienced businessmen, will invest substantial funds and also become personally liable on a bank loan and allow a total stranger with no business experience of any kind to exercise sole control over the partnership and radio station without any influence or participation on their part. The Radio structure is not a *bona fide* business arrangement entitled to 100 percent integration credit. While the Radio showing makes a good paper case for purposes of attempting to prevail in a comparative hearing, it is nothing but a facade without substance and will not be credited. It is a sham-type arrangement similar to those in *Metroplex Communications, Inc.*, 4 FCC Rcd 8149 (1989); *Pacific Television, Ltd.*, 2 FCC Rcd 1101 (1987), review denied, 3 FCC Rcd 1700 (1988); *Magdalene Gunden Partnership*, 2 FCC Rcd 5513 (1987), reconsidered, 3 FCC Rcd 488 (1988), review denied, 3 FCC Rcd 7186 (1988); *N. E. O. Broadcasting Company*, 103 FCC 2d 1031, 1033-1034 (1986); and *Louisiana Super Communications Limited Partnership*, 102 FCC 2d 1293 (1985).

96. Finally, the involvement of Richard Adams in sham applications is nothing new. Specifically, in *Marlin Broadcasting of Central Florida, Inc.*, 4 FCC Rcd 7945 (1989), the Review Board considered Richard Adams and the other limited partners' involvement in the Highland Communications, Ltd., application and concluded that the past involvement and participation of the limited partners "augurs that" the general partner "will continue to rely upon, and defer to, the 'limited' partners." This is the same conclusion that the Presiding Judge has reached in this proceeding.[8]

97. Silver, as noted, has proposed no integration and is, therefore, not entitled to any integration credit. Neither is Radio for the reasons previously cited. Walter receives only part-time credit. Communications has been awarded 100 percent integration credit. This credit is enhanced by two-thirds minority ownership; one-third female ownership; two-thirds past broadcast experience; and one-third civic involvement. Thus, Communications is the clear comparative winner, and this result would obtain even if Walter was awarded 100 percent integration credit because the enhancement factors would greatly favor the Communications application. Accordingly, IT IS ORDERED that unless an appeal from this Initial Decision is taken by a party, or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the Rules,[9] the application of Silver Springs Communications (File No. BPH-870630MS) for a construction permit for a new FM station on Channel 238A in Silver Springs, Florida, IS GRANTED, and the competing applications of A. P. Walter, Jr. (File No. BPH-870630MU), Silver Springs Radio Communications, Ltd. (File No. BPH-870630MW), and Silver Radio Partners (File No. BPH-870630MX) ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph Stirmer
Administrative Law Judge

FOOTNOTES

[1] By *Order*, FCC 88M-1774, the Presiding Judge granted a "Petition for Leave to Amend" filed May 20, 1988, by Sun Coast Communications Limited Partnership, and accepted the amendment changing the applicant's name to "Sun Coast Communications Limited Partnership of Silver Springs."

[2] Mr. Murphy had known John Adams for some 25 years. John Adams was a customer of the Sun Bank of Ocala for at least 16 years, and he had frequently borrowed money there.

[3] Counsel for Radio conceded on the record that "There's never been a claim by this applicant that her financial statement was the basis of any of the financing that was offered to this applicant." (Tr. 629.)

[4] As noted, the bank loan letter of the Sun Bank is for $500,000, an amount in excess of what is required by Radio to construct and operate its proposed radio station for three months. Questions regarding the sufficiency of the funds or the sufficiency of the applicant's cost estimates were excluded from the scope of the instant issue by the Presiding Judge at the prehearing conference. (Tr. 476.)

[5] *Louis Adelman*, 29 FCC 1223 (1960), *affirmed sub. nom., Guinan* v. *Federal Communications Commission*, 297 F. 2d 782 (1961).

[6] The arguments made by Radio that Communications is a sham appear more relevant and applicable to its own application.

[7] There is nothing to indicate that Givens is now permanently foreclosed from meeting her partners' financial contributions, thereby regaining her status to share equally in the profits and losses.

[8] Footnote 18 of the Review Board decision in *Marlin Broadcasting of Central Florida, Inc.*, 4 FCC Rcd 7945 (1989), states as follows:

> Moreover, and in any event, we could not grant Highland's application without first remanding the proceeding on an issue to explore the roles of its "limited" partners Adams and Rutledge in *Rockledge Radio, Ltd.*, 4 FCC Rcd 3465 (ALJ 1989). The ALJ presiding there found that an applicant created by Highland principals Adams and Rutledge was a sham, which recruited a purported "general" partner to front for its "limited" partners. Adams there appears to have played a prominent role, *see id.*, at 3467-3468. As a result of these findings, the Board refused to approve a settlement in which Adams, *inter alia*, would be a principal of the successor licensee. *See, Rockledge Radio, Ltd.*, 4 FCC Rcd 5092 (Rev. Bd. 1989). Were we to find, after supplemental hearing, that Adams played a key role in attempting to project a sham applicant in *Radio Rockledge*, Highland's qualifications could be affected. The Board takes seriously any attempted abuse of the Commission's comparative processes, and would not reward fraud in one case with a Construction Permit grant to that same individual in another proceeding. Since Adams' role in the Rockledge sham is not entirely clear from that record, further exploration would be necessary here. *Cf., Allegan County Broadcasters, Inc.*, 83 FCC 2d 371, 373-374 (1980).

This same result would obtain here. But, because Radio is a sham arrangement not entitled to integration credit, it is not the preferred applicant in this proceeding. There is, thus, no need to consider the issues left unresolved in the *Rockledge Radio, Ltd.* case. (The Rutledge referred to in *Marlin, supra*, was also involved early-on in the initial planning of the Radio application.) (Walter Ex. 7, p. 8.)

[9] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T COMMUNICATIONS — Transmittal Nos. 1762, 1880, and 2004

Revisions to Tariff F.C.C. No. 1

MEMORANDUM OPINION AND ORDER

Adopted: January 4, 1990; Released: January 5, 1990

By the Deputy Chief, Common Carrier Bureau:

1. On August 31, 1989, American Telephone and Telegraph Company (AT&T) filed Transmittal No. 1762 to change the rate levels and rate structure for its Software Defined Network (SDN) service. The revisions would establish a new service -- the Local Account Billing Option (LABO) -- which would allow one customer to order SDN service for end users located in different locations, as long as the ordering customer owns the end user, operates it under a franchise, or provides the end user with centralized management, oversight, or coordination. AT&T Description and Justification (D&J) at 6-8. While the AT&T customer orders the SDN service, the end users must pay for that portion of the service they use. Hence, the ordering customer is not held responsible for the financial obligation incurred by the end users for the use of AT&T's SDN service. *Id.*

2. US Sprint Communications Company Limited Partnership (Sprint) filed a petition to reject or, in the alternative, to suspend and investigate on September 15, 1989. AT&T filed a reply on September 25, 1989. Subsequently, AT&T filed Transmittal No. 1880 on November 3, 1989, in order to address some of the concerns raised by Sprint regarding AT&T's LABO service. Specifically, Transmittal 1880 eliminated the requirement in Transmittal 1762 that end users engage in a common business using a common brand or trade name. Sprint petitioned against Transmittal 1880 on November 13, 1989, and AT&T filed a reply on November 22, 1989. Subsequently, pursuant to Special Permission No. 89-922, AT&T deferred Transmittal 1880 and that portion of Transmittal 1762 regarding LABO.

3. On November 28, 1989, the Bureau issued an Order denying petitions relating to portions of Transmittal 1762.[1] The Order did not address those parts of Transmittal 1762 and 1880 regarding LABO. Subsequently, pursuant to Special Permission No. 89-1028,[2] AT&T filed Transmittal No. 2004 on January 3, 1990, amending Transmittal Nos. 1762 and 1880. Transmittal 2004 amended the definition of "customers" eligible for LABO to include agents or those entities which have some type of contractual arrangement with end user customers.

4. The Common Carrier Bureau has reviewed the tariff transmittals, AT&T's revisions, and the various pleadings. We conclude that no compelling argument has been presented that the tariff transmittal is patently unlawful so as to require rejection and that no question has been presented that warrants investigation at this time.

5. IT IS THEREFORE ORDERED that the petition to reject or, in the alternative, to suspend and investigate filed by US Sprint Communications Company Limited Partnership against AT&T Communications, Tariff F.C.C. No. 1, Transmittal Nos. 1762 and 1880, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief, Common Carrier Bureau

FOOTNOTES

[1] *See* AT&T Communications, Transmittal Nos. 1762 and 1880, DA 89-1523, released Nov. 28, 1989 (Com.Car.Bur.).

[2] Letter from Chief, Tariff Division, to C.E. Link, Administrator - Rates and Tariffs, Dec. 29, 1989.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 90-1

In the Matter of

Local Exchange Carrier
Access Tariff Rate and
Earnings Levels

ORDER TO SHOW CAUSE

Adopted: January 5, 1990; Released: January 5, 1990

By the Deputy Chief, Common Carrier Bureau:

I. BACKGROUND

1. Under the Access Charge Rules, Part 69 of the Commission's Rules, 47 C.F.R. Part 69, local exchange carriers (LECs) are required to target their access rates to the authorized rate of return, both in required annual filings and in any voluntary midcourse filings. In 1988, the Commission shifted the annual access tariff filings from a January - December to a July - June access year and established two transitional fifteen month access periods - January 1988 - March 1989 and April 1989 - June 1990. *Access Tariff Filing Schedules*, CC Docket No. 88-326, 3 FCC Rcd 5495 (1988)(*Tariff Filing Deferral Order)*. The *Tariff Filing Deferral Order* recognized that the use of fifteen month access periods increased the risk that rates would not be targeted with sufficient accuracy to comply with the rate of return prescription if LECs did not retarget their rates voluntarily in appropriate cases. The Commission directed the Bureau "to make any necessary adjustments should carriers fail to initiate adjustments themselves." *Tariff Filing Deferral Order*, 3 FCC Rcd at 5496. In 1988, the Bureau accordingly directed LECs that had not voluntarily retargeted rates earning apparently excessive returns to show cause why the rates should not be reduced for the period from January through March, 1989. *Local Exchange Carrier Access Tariff Rate Levels*, CC Docket No. 88-554, 4 FCC Rcd 762 (1988)(*1988 Show Cause Order)*. In most cases, the affected LECs did file rate reductions in response to the *1988 Show Cause Order*, but in other cases they provided justifications for their existing rates. *Local Exchange Carrier Access Tariff Rate Levels*, 4 FCC Rcd 2168 (1989).

II. DISCUSSION

2. Quarterly earnings reports filed pursuant to the Commission's Part 65 rate of return reporting rules reveal that many LECs realized returns in excess of 12.4 percent in one or more of the Part 65 reporting categories for the first six months of the current fifteen month access period. It appears likely, in the absence of special circumstances that would cause particular rates to produce a much lower return during the latter months of an access period, that continuation of rates that produced returns in excess of 12.4 percent during the first six months of the access period would result in excessive returns for the entire period.

3. LECs have filed adjusted rates to reflect certain changes effective in calendar 1990 that were not reflected in the April - December 1989 test period that the LECs used to project cost and demand in order to compute the access rates that became effective on April 1, 1989. *January 1, 1990, Local Exchange Carrier Access Tariff Filings*, (Com.Car.Bur., released Dec. 21, 1989)(*1989 Access Order)*. Those adjustments would not, however, correct rates to reflect any errors in the April - December 1989 test period projections. Those adjustments merely reflect changes that would distort earnings from rates that were accurately targeted for an April - December 1989 test period. A separate adjustment would be required for rates that were not accurately targeted for an April - December 1989 test period. Some LECs that achieved category earnings in excess of 12.4 percent during the April - September 1989 period have filed midcourse reductions to adjust for such test year projection errors, but others have not done so.

4. We have accordingly decided to direct the carriers listed in the Appendix to either file tariff transmittals reducing the relevant rates to retarget those rates to produce a category return that does not exceed 12.0 percent for the February - June 1990 period or to show cause why failure to reduce such rates would not result in excessive category earnings for the April 1989 - June 1990 access period.[1] The Appendix lists each Tier 1 carrier that reported category earnings in excess of 12.4 percent for the April - October 1989 period and which has not filed a midcourse correction to reduce rates for the relevant category.[2]

III. PROCEDURAL MATTERS

A. *Filing Schedules*

5. Each carrier listed in the Appendix is designated as a party. Each party that does not elect to file a new tariff transmittal shall file an Answer. If the carrier files a transmittal, it shall explain and justify its calculation of the appropriate reductions in the support material accompanying its transmittal. If the carrier elects to show cause why it should not be required to file such reductions, in whole or in part, it shall include in its Answer the information specified below and any other information necessary to respond specifically and completely to the allegations and matters contained in this Order to Show Cause.

6. It is important that we establish an expedited hearing cycle which will also allow the LECs a fair opportunity to address the relatively narrow issue of whether the LECs' present rates are likely to produce earnings that exceed the allowable rate of return. Accordingly, we direct each LEC listed in the Appendix to file, no later than January 22, 1990, a tariff transmittal proposing rate reductions that retarget the relevant rates to a 12.0 percent rate of return, or an Answer showing cause why the Bureau should not prescribe reduced rates. The transmittals that reduce rates are to be effective no later than February 15, 1990. Oppositions to the Answers or petitions to reject, suspend or investigate the transmittals may be filed no

later than 12:00 noon, Eastern Standard Time, on January 26, 1990. Replies may be filed no later than 12:00 noon, Eastern Standard Time on January 31, 1990.

B. *Ex Parte Requirements*

7. For the purposes of this non-restricted notice and comment investigation, the parties are advised that *ex parte* presentations are permitted except during the "Sunshine Agenda" period. *See generally* Section 1.120(a) of the Commission's Rules. The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission (1) releases a final Order; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever comes first. *See* Section 1.202(f) of the Commission's Rules. During the Sunshine Agenda period, no presentation, *ex parte* or otherwise, is permitted unless specifically requested by the Commission or Commission staff for the clarification or adduction of evidence or the resolution of issues in the proceeding. *See* Section 1.1203 of the Commission's Rules.

8. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding; or (2) if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. *See* Section 1.1202(b) of the Commission's Rules. Any person who submits a written *ex parte* presentation must provide on the same day it is submitted a copy of the presentation to the Commission's Secretary for inclusion in the public record. Any person who makes an oral *ex parte* presentation that presents data or arguments not already reflected in that person's previously-filed written submissions must provide on the day of the oral presentation a written memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments and must state on its face that the Secretary has been served with a copy and must also state by docket number or other specific reference the proceeding to which it relates. *See* Section 1.1206 of the Commission's Rules.

C. *Filing Requirements*

9. An original and seven copies of all pleadings shall be filed with the Secretary of the Commission. In addition, one copy shall be delivered to the Commission's commercial copying firm, International Transcription Service, Inc. (ITS), Room 246, 1919 M Street, N.W., Washington, D.C. 20554. Such comments should specify the docket number of this proceeding.

10. All relevant and timely Answers, Oppositions, and Petitions will be considered by the Bureau.

D. *Paperwork Reduction Act*

11. The proceeding established in this Order has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection, or recordkeeping, labeling, disclosure, or record retention requirements as contemplated under the statute.

IV. ORDERING CLAUSE

12. Accordingly, IT IS ORDERED, pursuant to Sections 205(a), 4(i), 213, 218, 220, and 403 of the Communications Act, 47 U.S.C. §§ 205(a), 154(i), 213, 218, 220, 403, and Section 1.701 of the Commission's Rules, 47 C.F.R. § 1.701, that the carriers listed in the Appendix of this Order who do not elect to file revised tariffs to avoid overearnings are directed to SHOW CAUSE why they should not be required to reduce the relevant rates described in the Appendix to this Order.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief, Policy
Common Carrier Bureau

APPENDIX A

COMPANIES WHICH OVEREARNED IN THE PERIOD
APRIL 1989 - SEPTEMBER 30, 1989
AND HAVE NOT FILED MID-COURSE CORRECTIONS,
BY RATE CATEGORY

NAME OF COMPANY	COMMON LINE ROR	TRAFFIC SENSITIVE SWITCHED ROR	SPECIAL ROR
1 AMERITECH OPERATING COMPANIES			*
2 NEW YORK TELEPHONE		*	
3 NEVADA BELL	*	*	*
4 PACIFIC BELL		*	*
5 SOUTHWESTERN BELL TEL CO.-TOTAL CO. W/O KANSAS	*		
6 CENTRAL TELEPHONE COMPANY OF TEXAS	*		
7 CENTRAL TELEPHONE COMPANY - NEVADA			*
8 CONTEL OF CALIFORNIA, INC.			*
9 CONTEL OF THE NORTHWEST			*
10 GTE NORTH INCORPORATED - ILLINOIS			*
11 GTE NORTH INCORPORATED - INDIANA			*
12 GTE NORTH INCORPORATED - IOWA			*
13 GTE NORTH INCORPORATED - MICHIGAN			*
14 GTE NORTH INCORPORATED - MINNESOTA			*
15 GTE NORTH INCORPORATED - MISSOURI			*
16 GTE NORTH INCORPORATED - OHIO			*
17 GTE NORTH INCORPORATED - PENNSYLVANIA			*
18 GTE NORTH INCORPORATED - WISCONSIN			*
19 GTE NORTHWEST INCORPORATED - WA/OR/CA(WC)			*
20 UNITED TELEPHONE CO. OF INDIANA, INC.			*
21 UNITED TELEPHONE CO. OF OHIO		*	
22 UNITED TELEPHONE CO. OF PENNSYLVANIA		*	
23 UNITED TELEPHONE SYSTEM - MIDWEST GROUP		*	
24 LINCOLN TELEPHONE AND TELEGRAPH COMPANY	*		
25 SOUTHERN NEW ENGLAND TELEPHONE COMPANY	*		*

NOTE: A '*' in a colum indicates the company is overearning for that rate category.

FOOTNOTES

[1] For this purpose, the "category" return means the category the Commission selected in the Part 65 rules for purposes of monitoring compliance with the access rate of return prescription.

[2] The filing schedule and notice periods established in this Order do not affect midcourse corrections that those carriers or any other LEC files for any purpose other than reducing rates for the categories and tariff areas described in the Appendix.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

National Association
of Broadcasters

Petition for Issuance of a
Declaratory Ruling to Preempt
State and Local Regulation of
RF Radiation Standards that
Affect Communications Services
to the Public

ORDER

Adopted: January 9, 1990; Released: January 11, 1990

By the Commission:

1. Before us for consideration is a petition for declaratory ruling filed by the National Association of Broadcasters (NAB) on March 31, 1986, requesting that we preempt state and local regulation of radiofrequency (RF) radiation standards that affect communications services to the public. Also before us are numerous comments and reply comments supporting or opposing NAB's petition.

2. In its petition, NAB states that state and local RF radiation standards arbitrarily limit or preclude communications services to the public. In particular, NAB argues that a proliferation of state and local RF radiation regulations is impeding the development and introduction of new technologies and services. Because, according to NAB, these actions directly conflict with the Commission's goal of fostering interstate communications, NAB asks that we preempt state and local RF radiation standards more stringent than the RF radiation guidelines established by the American National Standards Institute (ANSI).[1]

3. We do not believe that preemption of state and local RF radiation standards is warranted at this time. The Commission has previously declined to preempt state and local regulation of RF radiation. *See Responsibility of the Federal Communications Commission to Consider Biological Effects of Radiofrequency Radiation When Authorizing the Use of Radiofrequency Devices*, 100 FCC 2d 543, 557-558, *reconsideration denied*, 58 RR 2d 1128, 1131 (1985). The record before us in this proceeding does not provide a basis for altering our previous decisions. Any specific problems warranting action by the Commission can be brought to our attention on a case-by-case basis.[2]

4. Accordingly, IT IS ORDERED, that the petition for declaratory ruling filed by the National Association of Broadcasters on March 17, 1986 IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] The ANSI guidelines are used as processing guidelines under our environmental rules. *See* 47 C.F.R. § 1.1307(b).

[2] We note that the Environmental Protection Agency previously proposed the development of federal RF guidelines (EPA Docket No. A-82-43). The Commission has supported EPA action in this area (*see* letter from Chairman Patrick to EPA Administrator Thomas, November 29, 1988), and we continue to do so. In this regard, our staff is in continuing contact with EPA's staff on this important issue.

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 83-426

In the Matter of

Amendment of Part 94 of the
Commission's Rules and Regulations
to Authorize Private Carrier Systems
in the Private Operational-Fixed
Microwave Radio Service

Order

Adopted: January 10, 1990; Released: January 11, 1990

By the Commission:

1. On April 1, 1985, we adopted a *First Report and Order* (*First Order*) in the above-captioned proceeding.[1] Under the regulations established in the *First Order*, licensees in the Private Operational-Fixed Microwave Service (OFS) may sell excess capacity on their own systems to other Part 94 eligibles.[2] In addition, entrepreneurs may build private microwave systems solely to sell capacity to other Part 94 eligibles for a profit. In either case, service may only be provided to meet the internal communications needs of eligible entities.

2. In the *First Order*, we indicated that we would issue a *Further Notice of Proposed Rule Making* (*Further Notice*) to determine whether we should allow OFS licensees to lease capacity on their systems to common carriers for the transmission of common carrier communications. Common carriers are eligible to use the OFS frequencies, [3] but, like other eligibles, their use is limited to communications that are internal in nature. Our Rules specifically prohibit use of radio facilities licensed under Part 94 for rendition of a common carrier communications service. 47 C.F.R. § 94.9(b)(1).

3. The *Further Notice*, released September 12, 1985,[4] proposed to permit private carriers to lease capacity to non-dominant common carriers to transmit common carrier traffic.[5] It attracted substantial comment from a broad range of parties, including private licensees, common carriers, government entities, and trade associations. Due to the length of time which has elapsed since comments were filed, the record in this proceeding is stale and no decision is possible on the current record. If any person is interested in pursuing this issue, we remain open to doing so; however, further inquiry would be necessary before action could be taken. We are therefore terminating this proceeding and will initiate another if we pursue these issues further.

4. In view of the above, pursuant to Sections 4(i) and 303 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303, IT IS ORDERED that this proceeding is TERMINATED without further action.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] First Report and Order, Docket No. 83-426, 57 RR2d 1486 (1985).

[2] "Eligibles" includes anyone eligible for a license under Part 80 (which governs stations in the Maritime Services), Part 87 (which governs Aviation Services), or Part 90 (which governs Private Land Mobile Radio Services). 47 C.F.R. § 94.5.

[3] One category of user that qualifies for licensing in the Private Land Mobile Radio Service is Business Radio Service users, a category that includes all entities engaged in the operation of a commercial activity. 47 C.F.R. § 90.75 (a)(1). Common carriers are, of course, engaged in a commercial activity. Common carriers are also eligible under Section 90.81 (Telephone Maintenance Radio Service) to use OFS facilities for communications directly related to the construction, repair, maintenance or operation of their communications common carrier facilities. 47 C.F.R. § 90.81.

[4] Further Notice of Proposed Rule Making, PR Docket No. 83-426, (FCC 85-454) released September 12, 1985, 50 FR 37878 (September 18, 1985).

[5] The *Further Notice* proposed that non-dominant common carriers who are OFS licensees be prohibited from using the frequencies for their own common carrier traffic. It also proposed to preclude dominant common carriers from any of the rule liberalizations. A dominant common carrier is defined by the Rules as a carrier found by the Commission to have market power (*i.e.*, power to control prices). A non-dominant common carrier is a carrier not found to be dominant. 47 C.F.R. § 61.12.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: January 17, 1990

COMMENTS INVITED ON WASHINGTON, D.C. METROPOLITAN AREA REGIONAL PUBLIC SAFETY PLAN

The Commission has received the public safety radio communications plan for the Washington, D.C. Metropolitan Area (Region 20).

In accordance with the Commission's Report and Order in General Docket 87-112 implementing the Public Safety National Plan, parties are hereby given thirty days from the date of Federal Register publication of this public notice to file comments and fifteen days to reply to any comments filed. (*See* Report and Order, General Docket 87-112, 3 FCC Rcd 905 (1987), at paragraph 54.)

In accordance with the Commission's Memorandum Opinion and Order in General Docket 87-112, Region 20 consists of the following counties: Arlington, Fairfax, Fauquier, Loudoun, Prince William and Stafford counties, Virginia; Washington, D.C. and the State of Maryland. General Docket 87-112, 3 FCC Rcd 2113 (1988).)

Comments should be clearly identified as submissions to *General Docket 90-7, Washington, D.C. Metropolitan Area - Region 20,* and commenters should send an original and five copies to the Secretary, Federal Communications Commission, Washington, DC 20554. Questions regarding this public notice may be directed to Maureen Cesaitis, Private Radio Bureau, (202) 632-6497, or Fred Thomas, Office of Engineering and Technology, (202) 653-8112.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-627

In re Applications of

KELLY BROADCASTING SYSTEM CORPORATION — File No. BRH-881014RF

For Renewal of License
of Station WNIK-FM,
Arecibo, Puerto Rico

and

SAN LUIS BROADCASTING, INC. — File No. BPH-890103MC

For a Construction Permit
for a New FM Broadcast
Station on Channel 293B1
at Arecibo, Puerto Rico

HEARING DESIGNATION ORDER

Adopted: December 20, 1989; Released: January 24, 1990

By the Chief, Audio Services Division:

1. The Commission, by the Chief, Mass Media Bureau, acting pursuant to delegated authority, has before it for consideration: (a) the application of Kelly Broadcasting System Corporation ("Kelly") for renewal of license of Station WNIK-FM, Arecibo, Puerto Rico; and (b) the application of San Louis Broadcasting, Inc. ("San Louis") for a construction permit for a new FM broadcast station at Arecibo, Puerto Rico. The two applications are mutually exclusive because San Luis proposes to operate on Channel 293B1, the channel on which WNIK-FM presently operates.

2. On May 2, 1989, Kelly filed an Informal Request seeking dismissal or denial of San Luis' application. Kelly claims that the application is incomplete and defective because San Louis, a corporate applicant, was neither officially incorporated nor financially qualified at the time it filed its application. Kelly also argues that San Luis' sole shareholder, Pablo Llerandi, is unqualified to be a Commission licensee because he once owned WNIK-FM, but was forced to relinquish it as a result of a default judgment, and has since failed in all attempts to regain control of the station. Finally, Kelly asserts that there is no basis for granting San Luis' request for a short-spacing waiver. In its Opposition to Informal Request, filed May 17, 1989, San Luis argues that on May 11, 1989, it timely filed an amendment to its application reporting the company's official incorporation and proposing a new, fully-spaced transmitter site. San Luis also argues that although it represented in its application that it was not financially qualified, such a negative response goes to the grantability of its application, not its acceptability. Kelly's Reply to Opposition to Informal Request, filed May 30, 1989, essentially reiterated previous arguments.

3. On July 26, 1989, Kelly also filed a Petition to Deny the San Louis application. Kelly's Petition to Deny is similar to its Informal Request, except that in lieu of arguing against San Luis' short-spacing waiver request and seeking dismissal because San Luis was not initially incorporated, Kelly asserts anew that there exist "serious questions" about the availability and suitability of San Luis' transmitter site. In support, Kelly provides a letter from a consulting engineer who suggests that the site is subject to local restrictions for which permits have not been issued; the site may be affected by a new road; and the site could "endanger" the Arecibo Observatory. In its Opposition to Petition to Deny, San Luis argues that the consulting engineer's letter was not prepared under oath; San Luis is not required to obtain zoning approval as a condition to grant of its application; there is no evidence that San Luis could not secure whatever local approval is required at the appropriate time; and there is no basis for alleging that either a road or the Arecibo Observatory would have an affect on or be affected by San Luis' proposed transmitter site.

4. Kelly's Informal Request and Petition to Deny will be denied. San Luis' May 11, 1989, amendment, which will be accepted, resolves the incorporation and short spacing matters raised by Kelly. Furthermore, dismissal of San Luis' application is not warranted because San Luis represented therein that it was not financially qualified. When San Luis filed its application, the prevailing policy was to accept such applications and specify a financial qualifications issue to be resolved at hearing. *See Revision of FCC Form 301*, 4 FCC Rcd 3853, n. 71 (1989). Thus, the defect went to grantability, not acceptability. This policy has since changed. In *Revision of FCC Form 301*, the Commission specifically stated that henceforth, "if an applicant fails to certify in the application that it is financially qualified (i.e., if it does not respond to the question or checks 'No'), its application will be returned as unacceptable or non-tenderable pursuant to 47 C.F.R. § 73.3564." 4 FCC Rcd at 3859. Additionally, there is no merit to Kelly's argument that Mr. Llerandi has filed his application for anything other than legitimate purposes. Since the character of an applicant is always an issue, if Kelly has evidence to the contrary, it will have every opportunity at hearing to make its case in this regard. Finally, we have considered Kelly's argument that San Luis' proposed transmitter site may be deficient. On the basis of the scant information provided, there is no basis for dismissing or denying San Luis' application or even specifying an appropriate issue against San Luis.

5. ACCORDINGLY, IT IS ORDERED, That pursuant to Section 309(e) of the Communications Act of 1934, as amended, the above-captioned applications are DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, to be held before an Administrative Law Judge at a time and place to be specified in a subsequent *Order*, upon the following issues:

(a) To determine whether San Luis Broadcasting, Inc. is financially qualified to be a Commission licensee.

(b) To determine which of the proposals would, on a comparative basis, better service the public interest; and

(c) To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

6. IT IS FURTHER OTHERED, That the amendment, filed May 11, 1989, by San Luis Broadcasting, Inc. IS ACCEPTED.

7. IT IS FURTHER ORDERED, That the Informal Request, filed May 2, 1989, and the Petition to Deny, filed July 26, 1989, by Kelly Broadcasting System Corporation ARE DENIED.

8. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

9. IT IS FURTHER ORDERED, That to avail themselves of an opportunity to be heard, the applicants herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this *Order*, file with the Commission, in triplicate, a WRITTEN APPEARANCE, stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this *Order*.

10. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give NOTICE of the hearing within the time and in the manner prescribed, and shall ADVISE the Commission of the publication of such notice as required by Section 73.3594(g) of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay
Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-494

In the Matter of

Enforcement of Prohibitions
Against Broadcast Indecency
in 18 U.S.C. § 1464

ORDER EXTENDING TIME TO FILE COMMENTS

Adopted: January 12, 1990; Released: January 12, 1990

By the Chief, Mass Media Bureau:

1. On October 26, 1989, the Commission adopted a *Notice of Inquiry*, 4 FCC Rcd 8358 (1989), in response to a remand of the record in *Action for Children's Television v. FCC*, No. 88-1916 (D.C. Cir. Sept. 13, 1989) (*ACT II*) to solicit public comment regarding the validity of a total ban on the broadcast of indecent material. The Commission established a deadline of January 19, 1990 for filing comments, and a deadline of February 16, 1990 for filing reply comments.

2. Before the Commission is a motion for extension of time filed jointly by parties, the majority of whom are petitioners in *ACT II*.[1] The joint petitioners request additional time because of difficulties in coordinating the positions of multiple parties and the time required to undertake and complete joint factual research into the issues raised in the *Notice*. Petitioners request an extension of 40 days for filing comments and reply comments.

3. As set forth in Section 1.46 of the Commission's Rules, 47 C.F.R. § 1.46, it is our policy that extensions of time shall not be routinely granted. However, we believe that, in this case, the grant of additional time will further the Commission's goal of developing a full and complete evidentiary record regarding the validity of a 24-hour ban on the broadcast of indecent material. In the *Notice*, the Commission urged parties to provide factual studies and data in response to numerous issues, including children's access to the broadcast media and children's listening and viewing habits, which are critical to the compilation of a complete evidentiary record. We will, therefore, extend the deadline by 30 days. We believe this extended time period will be sufficient to permit petitioners to complete their factual research and coordinate their comments among their multiple participants. Because of the need to expedite this proceeding, we do not anticipate granting further extensions of time in this proceeding, absent compelling justification.

4. Accordingly, IT IS ORDERED that the Motion for Extension of Time filed by joint petitioners IS GRANTED to the extent noted above, and in all other respects is denied.

5. IT IS FURTHER ORDERED that the times for filing comments and reply comments in this proceeding ARE EXTENDED to February 20, 1990 and to March 20, 1990 respectively.

6. This action is taken pursuant to authority found in Sections 4(i), 4(j) and 303(r) of the Communications Act of 1934, as amended, and Sections 0.204(b), 0.283, and 1.46 of the Commission's Rules.

7. For further information concerning this proceeding, contact Marilyn Mohrman-Gillis, Policy and Rules Division, Mass Media Bureau, (202) 632-7792.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

FOOTNOTE

[1] The motion was filed by Capital Cities/ABC, Inc., CBS Inc., Action for Children's Television, American Civil Liberties Union, Association of Independent Television Stations, Inc., Radio-Television News Directors Association, Great American Television and Radio Company, Inc., Infinity Broadcasting Corp., Motion Picture Association of America, Inc., National Association of Broadcasters, National Broadcasting Company, Inc., National Public Radio, People for the American Way, Post-Newsweek Stations, Inc., Public Broadcasting Service, The Reporters Committee for Freedom of the Press, and Society of Professional Journalists.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-416

In the Matter of

Amendment of	RM-7207
Section 73.202(b),	RM-7208
Table of Allotments,	RM-7209
FM Broadcast Stations.	
(Metropolis, Illinois,	
Camden and Henderson,	
Tennessee)	

ORDER DENYING REQUEST FOR EXTENSION OF TIME TO FILE REPLY COMMENTS

Adopted: January 12, 1990; Released: January 16, 1990

By the Chief, Allocations Branch:

1. On December 20, 1989, the Commission released a Public Notice accepting counterproposals filed by Purchase Sound, Inc., West Haven Broadcasting, and Valley Wide Broadcasting, Inc., in the above captioned matter. The Public Notice set a deadline of January 5, 1990, for filing comments in response to the counterproposals. On December 29, 1989, Sun Media, Inc. ("Sun Media") filed a request that the period to submit reply comments be extended to January 22, 1990. Sun Media notes that its engineer will be unable to review the pleadings in this proceeding until January 5, 1990, due to a holiday vacation.

2. Section 1.46(a) of the Commission's rules states the Commission's policy that extensions of time shall not be routinely granted. Sun Media has not stated sufficient grounds for departure from Commission policy.

3. Accordingly, *IT IS ORDERED*, That the Request for Extension of Time submitted by Sun Media, Inc., *IS DENIED*.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN. Docket No. 89-16

In the Matter of

Amendment of the Frequency Allocation and Aviation Services Rules (Parts 2 and 87) to provide frequencies for use by commercial space launch vehicles. RM-6423

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 11, 1990; Released: January 25, 1990

By the Commission:

I. INTRODUCTION

1. In a *Notice of Proposed Rule Making* (*Notice*), 4 FCC Rcd 1586 (1989), the Commission proposed to amend Parts 2 and 87 of the Rules, 47 C.F.R. Parts 2 and 87, to permit fully operational space launch vehicles[1] that are owned by non-Government[2] entities to use six frequencies in the 2310-2390 MHz band for telemetry communications. Frequencies in this band are currently available only for flight test telemetry. This *Report and Order* adopts the rules as proposed.

II. BACKGROUND

2. Both Government and non-Government entities are engaged in the development and testing of launch vehicles. Until recently the National Aeronautics and Space Administration (NASA) was the Government agency responsible for launching non-Government payloads into space. Non-Government entities wanting to launch a satellite or other payload had to go through NASA to obtain the appropriate launch vehicle and facilities. In 1986, however, the President announced that NASA will no longer be launching non-Government satellites or other payloads. Under the Presidential directive, responsibility for providing launch vehicles for non-Government payloads was transferred to the private sector. Government agencies were asked to facilitate this transfer by eliminating regulations that would impede non-Government space activities. The Presidential Directive on National Space Policy provides that the Government shall purchase commercially available space goods and services to the fullest extent feasible. [3]

3. The launching of satellites or other payloads is a very complicated operation. Launch vehicles are comprised of a large number of components that must function with great precision under severe environmental conditions. An equipment malfunction, even in a small component, can lead to total disaster resulting in the loss of millions of dollars. To reduce the chances of equipment malfunctioning, spectrum is allocated to permit the transmission of diagnostic data (*i.e.*, telemetry) during flight. Builders and users of launch vehicles use this telemetry capability to identify problem areas and improve performance.

4. In the United States the 1435-1535 MHz and 2310-2390 MHz bands are allocated for shared use by Government and non-Government entities for diagnostic telemetry[4] during flight testing.[5] These frequencies are only available for test flights and cannot be used for the transmission of diagnostic telemetry data to evaluate the flight performance of fully operational launch vehicles. Frequencies in the 2200-2290 MHz band are allocated for the purpose of monitoring fully operational launch vehicles. Unlike frequencies in the 1435-1535 MHz and 2310-2390 MHz bands, however, these frequencies are allocated exclusively for Government use. The frequencies were not made available since previously the Secretary of Defense advised the Secretary of Commerce that "use of the 2200-2290 MHz band by non-Government entities would be detrimental to U.S. national security interests." *See* letter dated July 22, 1985, from Mr. William D. Gamble, Deputy Associate Administrator, Office of Spectrum Management, NTIA, to Mr. William Torak, Deputy Chief, Spectrum Management Division, Office of Engineering and Technology, FCC.

5. The Aerospace and Flight Test Radio Coordinating Council (AFTRCC)[6] asked us to allow the use of six frequencies in the 2310-2390 MHz band by non-Government entities for telemetry transmission both during testing and when the launch vehicle becomes fully operational. In support of its petition (RM-6423), AFTRCC stated that the Office of the Commercial Space Transportation of the United States Department of Transportation (DOT) is responsible for administering the Government program for non-Government expendable launch vehicles (ELVs).[7] In adopting licensing regulations for non-Government launch activities, AFTRCC noted that DOT stressed that one of its major goals has been to encourage and promote the industry through carefully considered policies and procedures designed to eliminate, wherever possible, regulatory uncertainties.[8] Furthermore, AFTRCC pointed out that the Presidential Directive on National Space Policy, *supra*, calls upon the Government to identify and eliminate or propose for elimination applicable portions of United States' laws and regulations that unnecessarily impede non-Government space sector activities. AFTRCC also stated that it is important to resolve promptly any regulatory uncertainties, such as the availability of telemetry spectrum, in view of the enormous commitment of funds to be made by private sector ELV participants.

6. Concerning telemetry spectrum for fully operational launch vehicles that are owned by non-Government entities, the National Telecommunications and Information Administration (NTIA) with the advice of the Interdepartment Radio Advisory Committee (IRAC) informed AFTRCC that frequencies in the 2200-2290 MHz band, the band currently available for telemetry support of fully operational ELVs, were heavily used by the Federal Government and, therefore, could not be used on a long-term basis by non-Government entities. To resolve the problem, NTIA, with the advice of the IRAC, agreed with the AFTRCC proposal which identified six frequencies in the 2310-2390 MHz band suitable for telemetry

support of fully operational commercial ELVs. NTIA has stated that "Frequency support in the 2200-2900 MHz band for commercial ELV operations conducted at the Federal Government facilities may, however, be made part of agreements between the Government facility operator and commercial entities, subject to such constraints as are necessary to protect Government operations in the band. This support is expected to be of a short-term nature, pending the transition of commercial operations to another frequency band (i.e. 2310-2390 MHz)."[9] NTIA noted that it had requested DOT to develop a plan for the transition of non-Government space launch vehicle operations from the 2200-2290 MHz band to the 2310-2390 MHZ band. This plan was expected to consider NASA and Department of Defense (DOD) range support launch requirements for non-Government space launch vehicles. Additionally, NTIA pointed out that the U.S. Air Force has indicated that they can currently support launches in the 2310-2390 MHz band.

III. PROPOSAL

7. The *Notice* in this proceeding proposed to amend Footnote US276 to the Table of Frequency Allocations contained in Section 2.106 of our Rules, 47 C.F.R. § 2.106, as well as Section 87.301(d)(1), 47 C.F.R. § 87.301(d)(1), to allow non-Government entities to use the frequencies 2312.500 MHz, 2332.500 MHz, 2352.500 MHz, 2364.500 MHz, 2370.500 MHz and 2382.500 MHz for telemetry transmissions in all phases (developmental and operational) of ELV operations. The *Notice* also stated that the purpose and use of re-usable launch vehicles (RLVs)[10] and ELV's appear to be identical. Although AFTRCC's petition referred only to telemetry transmissions for ELVs, in some cases the use of RLVs may be more economical. The *Notice*, therefore, requested comment on the benefits of amending our Rules to allow telemetry transmissions from fully operational RLVs on the same frequencies.

IV. COMMENTS

8. AFTRCC, American Rocket Company (AMROC), Capital Cities/American Broadcasting Company in conjunction with the Entertainment Sports Programming Network (ABC/ESPN), General Dynamics Corporation (GD), Martin Marietta Commercial Titan, Inc. (MMI), National Broadcasting Company, Inc. (NBC) and Society of Broadcast Engineers, Incorporated (SBE) filed comments in this proceeding.[11] Reply comments were filed by AFTRCC and GD.

9. AFTRCC AMROC, GD and MMI support our proposal to allow fully operational ELVs to use the six frequencies, 2312.500 MHz, 2332.500 MHz, 2352.500 MHz, 2364.500 MHz, 2370.500 MHz and 2382.500 MHz, for telemetry communications. AFTRCC also supports our proposal to allow fully operational RLVs to use these frequencies for telemetry communications. Additionally, AFTRCC requests that we clarify that the six frequencies proposed are reserved primarily for use in connection with fully operational ELV's or RLV's and that the remainder of the 2310-2390 MHz band is reserved primarily for traditional flight testing operations.[12]

10. Although supporting the proposal, AFTRCC, AMROC and GD voice concern that the Government could immediately discontinue providing frequency support in the 2200-2290 MHz band once frequencies in the 2310-2390 MHz band are available to non-Government fully operational ELVs.[13] They state that a sudden transition of telemetry frequencies for fully operational launch vehicles from the 2200-2290 MHz band to the 2310-2390 MHz band would cause disruption of service and increase launching costs. In support, they argue that many years may elapse before non-Government entities develop their own launch facilities and that reconfiguration of the DOD launch facilities to support telemetry transmissions in the 2310-2390 MHz band is currently in an embryonic stage. They also note that launch vehicles that are used now by Government and non-Government entities are cost efficient because they have identical requirements, and thus are built in the same assembly line, stored without customer discrimination before they are sold and use the same launch facilities. Government and non-Government launch vehicles that do not use the same telemetry frequency bands are not identical and cannot use the same assembly line and launch facilities, thus increasing their costs. For these reasons, AFTRCC, AMROC and GD argue that Government and non-Government entities must use the same telemetry frequency bands and that non-Government launch vehicles must be accommodated in the 2200-2290 MHz band until all Government support facilities are reconfigured to support telemetry transmissions in the 2310-2390 MHz band.[14] In this connection, GD notes that on April 4, 1989, at a meeting of the Commercial Space Transportation Advisory Committee, NTIA's Deputy Associate Administrator, William D. Gamble, related that the Air Force would not pressure commercial launch service operators to shift telemetry transmissions to the 2310-2390 MHz band for possibly ten years or more.[15]

11. AFTRCC and GD recognize, however, that the Commission does not have jurisdiction over the use of the Government allocated 2200-2290 MHz band or associated launch facilities and that, therefore, their comments on this issue could be beyond the scope of this proceeding. Nevertheless, they urge the Commission to seek, through IRAC and other Government forums, permission for non-Government entities to share this band and associated Government owned launch support facilities for a period of more than ten years. Additionally, they request that Government and non-Government entities always share the same telemetry frequencies.[16]

12. ABC/ESPN, NBC and SBE (collectively referred to as network broadcasters) state in their comments that Part 74 of the Commission's Rules gives primary use of broadcast auxiliary spectrum for short term operations to local broadcasters. *See* 47 C.F.R. § 74.24(c). As a result, when the broadcast auxiliary spectrum is fully occupied by the local broadcasters, the network broadcasters have on occasion been granted Special Temporary Authority (STA)[17] to use frequencies in the 2310-2390 MHz band for short term, nationwide broadcasts, of special events such as the 1989 Presidential Inaugural Parade, the 1986 rededication of the Statue of Liberty, and the Indianapolis 500 Auto Race.[18]

13. The network broadcasters argue that access to 2310-2390 MHz frequencies is essential for their operations, and they provide a number of recommendations for use of frequencies in this band. For example, ABC/ESPN recommend that the 2310-2390 MHz band be allocated on a secondary basis to the television networks and other programmers for use in connection with the

coverage of special national events. In the alternative, it recommends that the Commission declare this band available for such use on an STA basis and that AFTRCC and the Government frequency managers be ordered to clear the band when it is not in use or scheduled to be used by satellite launchers.[19] NBC states it has no objection now to the Commission's proposal, provided network broadcasters would be able to obtain STAs in the 2310-2390 MHz band on a secondary basis. If the Commission intends not to issue STAs to the network broadcasters, NBC contends it reserves the right to modify its position.[20] SBE recommends that the Commission issue a Further Notice of Proposed Rule Making in this proceeding proposing to allocate frequencies in the 2310-2390 MHz band, on a secondary basis, for broadcast and cable network transmissions.[21]

14. AFTRCC strongly opposes the network broadcasters' recommendations. It argues that the network broadcasters' requests are beyond the scope of this proceeding and should be denied. AFTRCC contends that the ABC/ESPN recommendation requesting AFTRCC and Government frequency managers to clear the 2310-2390 MHz band when not used by launch vehicles indicates that the network broadcasters are not familiar with aeronautical telemetry and the flight test coordination process. AFTRCC points out that in addition to launch vehicles, the 2310-2390 MHz band is used by aircraft that operate throughout the United States to transmit diagnostic telemetry test data. AFTRCC states that in many cases, especially when a disaster or crash occurs, analysis of these data provide design engineers the only means available to determine the cause of failure in aircraft as well as launch vehicles. In conclusion, AFTRCC suggests that the network broadcasters petition the Commission to realign the priorities between local and network broadcasters by amending Part 74 of the Rules.[22]

V. DISCUSSION

15. In general, there was no opposition to allowing non-Government entities to use the six frequencies in the 2310-2390 MHz band as specified in the *Notice*. Further, the only party commenting on extending use of these frequencies to fully operational RLVs favored the proposal. Accordingly, we amend Parts 2 and 87 to allow non-Government entities to use frequencies 2312.5 MHz, 2332.5 MHz, 2352.5 MHz, 2364.5 MHz, 2370.5 MHz and 2382.5 MHz for telemetry transmissions in fully operational ELVs and RLVs. This additional telemetry capability will help the U.S. private sector to compete in the world market for launch vehicles.

16. Several commenters voiced concern that the sudden transition of telemetry for fully operational launch vehicles from the 2200-2290 MHz (Government) band to 2310-2390 MHz band will cause disruption of service and increase costs. They asked that the Commission seek permission for non-Government entities to use the 2200-2290 MHz band until non-Government entities develop their own launch facilities. The use of the 2200-2290 MHz band by non-Government entities on a general basis has already been discussed with NTIA. Because of the heavy Government use of this band NTIA recommended against making it available on a general basis to non-Government entities.[23] We have no information that this situation has changed. Further, NTIA has not ruled out limited use of the 2200-2290 MHz band by non-Government entities and has even requested DOT to develop a transition plan in this regard. *See* para. 6, *supra*. For these reasons, we do not believe further Commission action at this time is needed.

17. AFTRCC requested that we clarify that the six frequencies specified in the *Notice* are reserved primarily for telemetry from fully operational launch vehicles. To provide maximum flexibility, in the *Notice*, we did not propose to differentiate between use of these frequencies for flight testing and for telemetry transmissions from fully operational launch vehicles. In other words, we proposed to leave the decision on frequency use, either developmental or operational telemetry, up to the user. We still believe this is the best approach. Industry, however, is free to establish a voluntary plan for telemetry use of frequencies in this band.

18. ABC/ESPN requested that the Commission allocate the 2310-2390 MHz band to television networks and other programmers, on a secondary basis, for coverage of special national events or, in the alternative, that the Commission specifically declare this band available for coverage of special national events on a special temporary authority basis and that AFTRCC and the Government's Range Commander Council/Frequency Management Group be ordered to clear such use when the band is not in use or scheduled to be used for satellite launches. In a similar request, SBE asked the Commission to issue a Further Notice of Proposed Rule Making proposing to allow broadcast and cable networks to use the 2310-2390 MHz band on a secondary coordinated basis.

19. As previously discussed, this band is currently allocated for shared use by Government and non-Government entities for diagnostic telemetry during flight testing. Manufacturers and contractors use the frequencies in this band extensively throughout the United States during design and flight readiness tests, to evaluate the integrity of components and systems used in aircraft and launch vehicles. Many of these tests are elaborate, requiring coordinated support by a wide area network of stations and participation of a great number of personnel. Frequently, due to equipment malfunctions or adverse weather conditions, these tests are aborted or extensively delayed. In short, sharing these frequencies with unlike services is difficult at best because schedules of telemetry flight tests are unpredictable and delays costly. Further, interference cannot be tolerated. For example, in the event of a crash the telemetry data may be the only means available to determine the cause of the crash. In this case, interference to the telemetry transmission could be disastrous. Finally, spectrum is already available to broadcasters and cable operators for broadcasts of special events. For these reasons, we decline to change the rules to provide specifically for broadcast and cable use of this band, even on a secondary basis. In the event that broadcast spectrum is fully used, however, we will consider short-term, limited-area STA requests to use frequencies in this band on a case-by-case basis. All such requests must be accompanied by a statement that the proposed use has been coordinated with AFTRCC and the Government's Range Commanders Council/Frequency Management Group.

VI. PAPERWORK REDUCTION ACT STATEMENT

20. The decision contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection and/or record keeping, labeling, disclosure, or record retention requirements; and will not increase or decrease the burden hours imposed on the public.

VII. REGULATORY FLEXIBILITY ACT FINAL ANALYSIS

21. The Commission hereby certifies pursuant to Section 605(b) of the Regulatory Flexibility Act of 1980 (Pub. L. 96-354), that these rules will not have a significant economic impact on a substantial number of small entities. Although these changes allow the aerospace community greater flexibility in the operation of launch vehicles and result in some expenditures for equipment, these additional, optional expenditures should be minimal.

VIII. ORDERING CLAUSES

22. Accordingly, IT IS ORDERED that pursuant to the authority contained in Sections 4(i) and 303 (g) and (r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303(g) and (r), Parts 2 and 87 of the Commission's Rules ARE AMENDED as set forth in the Appendix below.

23. IT IS FURTHER ORDERED that the request by Capital Cities/American Broadcasting Company and Entertainment Sports Programming Network that the Commission allocate the 2310-2390 MHz band, on a secondary basis, to television networks and other programmers for coverage of special national events and their alternative request that the Commission declare 2310-2390 MHz band available for coverage of special national events on a special temporary authority basis and that the Government's Range Commanders Council/Frequency Management Group be ordered to clear such use when the band is not in use or scheduled to be used by satellite launchers ARE DENIED.

24. IT IS FURTHER ORDERED that the request by the Society of Broadcast Engineers, Incorporated for the Commission to issue a Further Notice of Proposed Rule Making proposing to allow broadcast and cable networks to use the 2310-2390 MHz band on a secondary coordinated basis IS DENIED.

25. IT IS FURTHER ORDERED that this Report and Order will be effective on **March 12, 1990.**

26. IT IS FURTHER ORDERED that a copy of this Notice shall be sent to the Chief Counsel for Advocacy of the Small Business Administration.

27. IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Parts 2 and 87 of Chapter I of Title 47 of the Code of Federal Regulations are amended as follows:

A. Part 2 - FREQUENCY ALLOCATIONS AND RADIO TREATY MATTERS; GENERAL RULES AND REGULATIONS.

1. The authority citation for Part 2 continues to read as follows:

AUTHORITY; Sec. 4, 302, 303, 307, 48. Stat. 1066, 1082, as amended; 47 U. S. C. 154, 302, 303, 307, unless otherwise noted.

2. In Section 2.106 footnote US276 is revised to read as follows:

§ 2.106 Table of frequency allocations.

* * * * *

US276 Except as otherwise provided for herein, use of the band 2310-2390 MHz by the mobile service is limited to aeronautical telemetering and associated telecommand operations for flight testing of manned or unmanned aircraft, missiles, or major components thereof. The following six frequencies are shared on a co-equal basis by Government and non-Government stations for telemetering and associated telecommand operations of expendable and re-usable launch vehicles whether or not such operations involve flight testing: 2312.5, 2332.5, 2352.5, 2364.5, 2370.5 and 2382.5 MHz. All other mobile telemetering uses shall be secondary to the above uses.

* * * * *

B. Part 87 - AVIATION SERVICES

1. The authority for Part 87 continues to read as follows:

AUTHORITY: 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, unless otherwise noted. Interpret or apply 48 Stat. 1064 - 1068, 1081 - 1105, as amended; 47 U.S.C. 151-156, 301-609.

2. Section 87.5 is amended by adding after "Emergency locator transmitter (ELT) test station" a new definition for "Expendable Launch Vehicle" and after "Radionavigation service" a new definition for "Re-usable launch vehicle (RLV)" to read as follows:

§ 87.5 Definitions.

* * * * *

Expendable launch vehicle (ELV). A booster rocket that can be used only once to launch a payload, such as a missile or space vehicle.

* * * * *

Re-usable launch vehicle (RLV). A booster rocket that can be recovered after launch, refurbished, and re-launched.

* * * * *

3. In Section 87.303, paragraph (d)(1) is revised to read as follows:

§ 87.303 Frequencies.

* * * * *

(d)(1) Frequencies in the bands 1435-1535 and 2310-2390 MHz are assigned primarily for telemetry and telecommand operations associated with the flight testing of manned or unmanned aircraft and missiles, or their major components. Permissible uses include telemetry and telecommand transmissions associated with the launching and reentry into the earth's atmosphere as well as any incidental orbiting prior to reentry of manned or unmanned objects undergoing flight tests. In the 1435-1535 MHz band, the following frequencies are shared with flight telemetering mobile stations: 1444.5, 1453.5, 1501.5, 1515.5, 1524.5 and 1525.5 MHz. In the 2310-2390 MHz band, the following frequencies may be assigned on a co-equal basis for telemetering and associated telecommand operations of expendable and re-usable launch vehicles whether or not such operations involve flight testing: 2312.5, 2332.5, 2352.5, 2364.5, 2370.5 and 2382.5 MHz. In the 2310-2390 MHz band, all other telemetry and telecommand uses are secondary. The Maritime Mobile-Satellite Service will be the only service in the 1530-1535 MHz band after January 1, 1990.

* * * * *

FOOTNOTES

[1] A fully operational space launch vehicle is a booster rocket that is used to launch a payload, such as a missile or space vehicle, rather than a booster rocket used for flight test purposes.

[2] For the purpose of this proceeding the term "non-Government" applies to those private sector entities involved in the development, manufacture or operation of launch vehicles or associated major components for commercial purposes.

[3] *See* The White House, Office of the Press Secretary Fact Sheet, "Presidential Directive on National Space Policy," dated February 11, 1988.

[4] Additionally, the frequencies in the 1435-1535 MHz and 2310-2390 MHz bands are used to transmit telecommands that are directly associated with the support of the telemetering functions authorized in these bands.

[5] Telemetry transmissions in these bands must be associated directly with the flight testing of aircraft and launching into space, reentry into the earth's atmosphere, and incidental orbiting prior to reentry of manned or unmanned objects, undergoing flight tests. *See* 47 C.F.R. § 87.303(d)(1).

[6] AFTRCC is a trade association of major commercial entities engaged in the design and manufacturing of Government and non-Government aircraft, space vehicles, and their major components. AFTRCC is recognized by this Commission as the frequency coordinating committee for non-Government flight test telemetry station assignment. *See* Report and Order, Docket No. 18234, 15 FCC 2d 831 (1969).

[7] An expendable launch vehicle can be used only once to launch a payload such as a missile or space vehicle.

[8] *See* Commercial Space Transportation; Licensing Regulations, 53 FR 11004, 11008 (April 4, 1988).

[9] *See* letter from Mr. William D. Gamble, Deputy Associate Administrator, of the Office of Spectrum Management, of the National Telecommunications and Information Administration (NTIA), of the United States Department of Commerce, to Mr. Jack Parker, of AFTRCC, dated December 9, 1987.

[10] A re-usable launch vehicle is a booster rocket that can be recovered after launch, refurbished, and re-launched.

[11] ABC and NBC are national broadcast network entities. ESPN is an 80% ABC owned company that delivers household television programs via satellites. SBE is a national association of broadcast and communications engineers and technical operating personnel. AMROC is a company that is developing space transportation technology. GD and MMI are major manufacturers of space launch vehicles and other space components.

[12] *See*, for example, AFTRCC comments at 4 n. 1.

[13] As indicated in paragraphs 4 and 6 above, the 2200-2290 MHz band is allocated exclusively for Government use. These frequencies were not made available to non-Government entities for commercial space operation because the Secretary of Defense determined that such action would be detrimental to U.S. national security interests.

[14] *See*, for example, GD comments at 1 and reply comments at 4.

[15] GD comments at 9.

[16] AFTRCC comments at 5, 6, and 7 and GD comments at 9 n. 8.

[17] Under extraordinary circumstances the Commission may give to a station licensee or station applicant Special Temporary Authority (STA) to operate a new station or to operate licensed station in a manner which is beyond the scope of that authorized by the existing license. *See* 47 C.F.R. § 1.925(a).

[18] *See*, for example, NBC comments at 2.

[19] ABC/ESPN comments at 9.

[20] NBC comments at 4 and 5.

[21] SBE comments at 5 and 6.

[22] AFTRCC reply comments at 6, 7, 9 and 10.

[23] *See Notice*, para. 6.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-205

In re Applications of

LOCAL MORGAN HILL RADIO ASSOCIATES	File No. BPH-870625ML
MORGAN HILL FM LIMITED PARTNERSHIP	File No. BPH-870629MX
ETHNIC RADIO OF LOS BANOS, INC.	File No. BPH-870629MZ
MORGAN HILL BROADCASTING, A California Limited Partnership	File No. BPH-870629NB
TORO BROADCASTING GENERAL PARTNERSHIP	File No. BPH-870629ND
SOUTH VALLEY BROADCASTING A California Limited Partnership	File No. BPH-870629NH
LAURA W. HERRON and GREGORY S. GENETTI d/b/a HERRON & GENETTI	File No. BPH-870629NK
PETER MIEULI	File No. BPH-870629NN

For Construction Permit for a New FM Station on Channel 241A at Morgan Hill, California

ORDER

Adopted: January 11, 1990; Released: January 25, 1990

By the Commission:

1. Before the Commission are (1) an Application for Review filed April 18, 1989 by Morgan Hill FM Limited Partnership and (2) an Opposition to Application for Review filed May 4, 1989 by Coyote Communications, Inc. (successor in interest to the other seven captioned applicants). These pleadings relate to the decision of ALJ John Frysiak to dismiss with prejudice the application of Morgan Hill FM for failure to prosecute its application. FCC 89M-184 (Jan. 19, 1989), *appeal denied*, 4 FCC Rcd 2404 (Rev. Bd. 1989).

2. IT IS ORDERED that, pursuant to 47 C.F.R. § 1.115(g), the Application for Review filed by Morgan Hill FM Limited Partnership IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 85-228

In re Applications of

VALLEY BROADCASTING COMPANY (KVBC(TV)) Las Vegas, Nevada — File No. BRCT-830601KM

For Renewal of License

WILLIAM H. HERNSTADT ET AL. Las Vegas, Nevada — File No. BPCT-830901KK

For Construction Permit

ORDER

Adopted: January 11, 1990; Released: January 25, 1990

By the Commission:

1. The Commission has before it: (1) an Application for Review filed May 1, 1989 by William H. Hernstadt et al. and (2) Oppositions filed May 16, 1989 by Valley Broadcasting Company and the Mass Media Bureau. These pleadings relate to a decision of the Review Board granting Valley's application for renewal of its license to operate station KVBC(TV) in Las Vegas, Nevada and denying Hernstadt's mutually exclusive application for a construction permit. *Valley Broadcasting Co.*, 4 FCC Rcd 2611 (Rev. Bd. 1989).

2. IT IS ORDERED, That pursuant to 47 C.F.R. § 1.115(g), the application for review filed May 1, 1989 by William H. Hernstadt et al. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: January 25, 1990

TREATMENT OF EX PARTE CONTACTS IN PROCEEDINGS CONCERNING SHARED NETWORK FACILITIES AGREEMENTS FIFTH SUPPLEMENTAL SERVICE LIST

Pursuant to Public Notice, DA 89-829 (released July 14, 1989), all of the various formal and informal complaints and tariff investigations involving shared network facilities agreements (SNFAs) were designated as restricted proceedings for purposes of Commission Rules governing *ex parte* contacts. As stated in the Notice, any written presentations in CC Docket No. 85-166, Phase I, tariff investigation, the formal complaints listed in Appendix A of the Notice, or the informal complaints listed in Appendix B of the Notice must be served on all parties of record in CC Docket No. 85-166 and all parties to any formal complaints and informal complaints listed in Appendix C of the Notice. The Notice further provided that service would be required on all parties to any substantively related complaints filed in the future. Consistent with the July 14 Notice, public notices supplementing the original service list were released on August 21, 1989, September 25, 1989, October 31, 1989, and December 8, 1989. *See* Public Notice, DA 89-964 (released August 21, 1989); Public Notice, DA 89-1137 (released September 25, 1989); Public Notice, DA 89-1374 (released October 31, 1989); Public Notice, DA 89-1556 (released December 8, 1989).

In accordance with the July 14 Notice, we hereby further amend the service list contained in Appendix C of that Notice to include the following party:

Robert Rowland, Esquire
Capital Network System, Inc.
600 Congress Avenue, Suite 1250
Austin, Texas 78701

As stated in the July 14 Notice, this action is taken pursuant to Section 1.1200(a) of the Commission's Rules, 47 C.F.R. § 1.1200(a), which permits the Commission, in its discretion, to adopt modified or more stringent *ex parte* procedures in particular proceedings if the public interest so requires.

For further information, contact Thomas J. Beers or Kurt A. Schroeder at (202) 632-4887.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: January 25, 1990

ADDITIONAL COMMENT CYCLE FOR TELEPHONE AND DATA SYSTEMS, INC. PETITION FOR BLANKET WAIVER OF PART 36 RULES AND THE "STUDY AREA" DEFINITION

The public notice released November 22, 1989, DA 89-1485, inviting comments on the Telephone and Data Systems, Inc. (TDS) petition for blanket waiver of certain Part 36 rules and the "study area" definition provided a brief comment cycle which ended December 15, 1989. Several state commissions have expressed an interest in this proceeding but, because of the brevity of the comment cycle, were unable to file comments by December 15, 1989. In order to receive input from the state commissions and other interested parties that were unable to meet the previous deadline, there will be an additional comment cycle in this proceeding.

Parties may file comments on the TDS Petition for Blanket Waiver no later than **February 22, 1990.** Replies should be filed by **March 9, 1990.** Comments should reference AAD-1938. A copy of each pleading should be sent to Alicia Dunnigan, FCC, Common Carrier Bureau, 2000 L Street, N.W., Room 812, Washington, D.C. 20554 and to International Transcription Services, Inc. (ITS), 2100 M Street, N.W., Washington, D.C. 20036, (202) 857-3800. Copies are available for public inspection and copying in the Accounting and Audits Division public reference room, 2000 L Street, N.W., Room 812, Washington, D.C. Copies are also available from ITS.

For further information contact Alicia Dunnigan, (202) 634-1861.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

NATIONAL RURAL TELEPHONE COOPERATIVE	FOIA Control No. 89-130

On Request for
Inspection of Records

MEMORANDUM OPINION AND ORDER

Adopted: January 11, 1990; Released: January 19, 1990

By the Commission:

1. The Commission has under consideration an "Application for Review of Freedom of Information Action" filed on September 22, 1989, by the National Rural Telephone Cooperative (NRTC).[1] NRTC seeks review of an August 22, 1989, decision by the Chief, Common Carrier Bureau, which denied NRTC access to certain documents submitted to the Commission by Eastern Microwave Inc. (Eastern), Southern Satellite Systems, Inc. (Southern), and United Video, Inc. d/b/a The Superstar Connection (Superstar). On October 6, 1989, Eastern, Southern, and Superstar filed oppositions to the Application for Review.

BACKGROUND

2. Eastern, Southern, and Superstar are satellite carriers which provide, under contractual arrangements, superstation and network station programming to home satellite dish (HSD) distributors for viewing by HSD owners.[2] On May 1, 1989, the Commission released a *Notice of Inquiry* to examine whether and to what extent there is unlawful discrimination by satellite carriers against HSD distributors in the provision of such programming. *See Inquiry into the Existence of Discrimination in the Provision of Superstation and Network Station Programming, Notice of Inquiry* (*NOI*), Gen. Docket No. 89-88, 4 FCC Rcd 3883 (1989). The *NOI* was initiated in response to a congressional directive contained in the Satellite Home Viewer Copyright Act of 1988 (SHVA) [3] requiring the Commission to report to Congress on this matter.[4] Thus, the *NOI* asked the above-mentioned satellite carriers to "file with the Commission their contracts with [HSD] distributors" with the highest and lowest per subscriber rates and a random sample of at least twenty other contracts with rates in between the highest and the lowest." *NOI*, 4 FCC Rcd at 3885. The Commission stated that the carriers could seek confidential treatment of the contracts pursuant to section 0.459 of the Commission's rules, 47 C.F.R. § 0.459. The satellite carriers filed the contracts and requested that such documents be afforded confidentiality.

3. NRTC is an organization composed of numerous rural electric cooperatives and rural telephone systems located in 47 states. Among other functions, NRTC acts as an HSD distributor. On July 31, 1989, NRTC filed a FOIA request seeking access to "copies of all contracts, agreements, letters, correspondence and other documents" submitted by Eastern, Southern, and Superstar in connection with the *NOI*. *FOIA Request* at page 1. NRTC stated that, in comments filed in the *NOI* proceeding, it had documented specific instances of discrimination by satellite carriers against NRTC. According to NRTC, its comments explained that it is "required to pay between 500% to 800% more than cable distributors pay these same satellite carriers for the same satellite carriage." *FOIA Request* at page 2.[5] NRTC noted that, because the carriers had requested confidential treatment for their contracts, it was unable to determine "the price, terms and conditions, or even the number, type or identity of parties with whom these carriers entered into distribution agreements." *Id.* NRTC argued that, without that information, it was "unable to assess the discriminatory nature of these arragements and to participate effectively in further stages of this proceeding." *Id.*

4. The Bureau's decision stated that Exemption 4 of the FOIA shields from disclosure "commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). The Bureau noted that commercial or financial information is considered confidential when disclosure would likely cause substantial competitive harm to the submitter. *National Parks and Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974) (*National Parks I*). [6] The Bureau also explained, however, that FOIA exemptions are not mandatory and that the Government is afforded discretion to release arguably exempt information if disclosure is in the public interest. In this connection, the Bureau explained that, in determining whether the public interest outweighed legitimate grounds for non-disclosure of financial data, the Commission "insists upon a showing that the [confidential or financial] information is a necessary link in a chain of evidence that will resolve a public interest issue." *Classical Radio for Connecticut*, 69 FCC 2d 1517, 1520 n.4 (1978).

5. The Bureau concluded that disclosure of the contracts would likely cause substantial competitive harm to the subject carriers and, therefore, the documents were protected from disclosure under Exemption 4. The Bureau reasoned that disclosure could adversely affect the subject carriers' competitive posture with respect to HSD distributors and other carriers providing programming distribution services. Release of the contracts could enhance the distributors' bargaining position with respect to the subject carriers, and other carriers would be provided "model contracts" to use in negotiating with HSD distributors. Further, because the distribution contracts of the three subject carriers would be the only ones revealed, the Bureau found that the disclosure of the contracts would be particularly harmful to the competitive position of those carriers in the market for HSD programming distribution.[7]

6. The Bureau also noted that, in seeking disclosure of the distribution contracts, NRTC seemed to argue for discretionary release by the Commission and did not appear to challenge the applicability of Exemption 4. With respect to this issue, the Bureau found that the subject carriers' interests in protecting their sensitive data outweighed the public benefits which might be gained from disclosure at that time. The Bureau explained that the contracts were only one aspect of the discrimination inquiry and the Commission could not predict to what

extent it would rely on that data in preparing the report to Congress. In any event, the Bureau noted, it might choose to disclose the material only to Congress without necessitating public disclosure.

THE ARGUMENTS

7. NRTC's Application for Review raises two arguments in opposition to the Bureau's ruling.[8] First, NRTC maintains that disclosure of the contracts is necessary to the resolution of the issues raised in the underlying *NOI* concerning the distribution of superstation and network programming in the HSD market. NRTC states that it requested access to the distribution contracts "to assure that appropriate contracts had been provided for the Commission's consideration and to evalute those submitted for purposes of determining whether they were discriminatory, as Congress mandated." NRTC again claims that, without access to the contracts, it cannot represent effectively the interests of its members and thus, the Commission's ability to balance competing viewpoints in the *NOI* proceeding will be impaired.

8. Second, NRTC argues that, even if the Commission finds that portions of the contracts should be withheld, NRTC is entitled to all other non-exempt portions and a descriptive list of all the information withheld. Citing *Vaughn v. Rosen*, 484 F.2d 242 (D.C. Cir. 1977), NRTC states that agencies are required to summarize and index in detail the documents they determine are exempt from disclosure and thus, the Bureau's general assertions concerning the material withheld do not meet the *Vaughn* requirements.

9. Eastern, Southern, and Superstar filed oppositions to NRTC's application for review. Relying on its initial opposition to NRTC's FOIA request, Eastern reiterates that the contracts contain confidential commercial information that is exempt from disclosure under Exemption 4 of the FOIA. In its opposition to NRTC's application for review, Southern maintains that NRTC has not established grounds for reversing the Bureau's decision. Southern states that, in the *NOI* proceeding, NRTC has consistently argued that section 119(6) of the SHVA requires satellite carriers to sell their product to NRTC at the same price as sold to cable television systems. Therefore, Southern notes, NRTC has insisted on its need for the contracts at issue to compare the satellite carriers' wholesale costs and prices for both HSD and cable. Southern argues, however, that NRTC is in error because the legislative history of section 119(6) indicates that it was limited to discrimination among and between satellite distributors. Southern therefore argues that NRTC's justification in seeking disclosure of the contracts is beyond the scope of the *NOI* and, for that reason, NRTC's application for review should be rejected. Southern believes that NRTC has fully participated in the inquiry and it is incumbent upon the Commission to determine whether the subject carriers have responded adequately to the *NOI*'s directive.

10. Superstar agrees with the Bureau's analysis under Exemption 4 and notes that NRTC has not challenged the application of Exemption 4 to the requested documents. Like Southern, Superstar argues that NRTC's claimed interest in determining whether the Commission has obtained the appropriate data from the carriers does not compel disclosure of the documents because the Commission possesses all the information needed to make a determination in the *NOI*. Southern further asserts that, at this stage, NRTC is not entitled to a *Vaughn* index or summary of the documents withheld.[9]

DISCUSSION

11. Initially, we note that the Bureau's decision did not describe the types of contracts filed by Eastern, Southern, and Superstar. Our review of the documents withheld indicates that the subject carriers transmitted to the Commission a total of 32 contracts in response to the *NOI*.[10] Consistent with the Commission's information request, the carriers did not submit any contracts with cable system operators for programming distribution to cable subscribers via coaxial cable. Thus, the contracts withheld pertain only to parties engaged in the distribution of HSD programming.

12. With respect to the identified contracts, we agree that the Bureau properly found they are protected from mandatory disclosure under Exemption 4 of the FOIA. To justify withholding a document under Exemption 4 it is not necessary to show actual competitive harm. Rather, the entity or person seeking confidentiality of a document must show that substantial competitive injury is likely to result from disclosure. *See Gulf & Western Industries Inc. v. United States*, 615 F.2d 527 (D.C. Cir. 1979); *National Parks and Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). As noted before, many different entities in addition to the subject carriers provide HSD distribution services.[11] The participation of all of these entities in the HSD distribution market indicates that competition is vigorous. Further, disclosure of the contracts could result in substantial competitive harm. Release of the contracts at issue would provide other carriers with key contractual provisions that they can use in tailoring competitive strategies. Moreover, disclosure could adversely affect the subject carriers' negotiating posture with HSD distributors and might disrupt the carriers' business relationship with HSD distributors currently under contract with the carriers. Thus, the Bureau properly concluded that the contracts fall within the scope of Exemption 4.

13. In any event, as the Bureau noted in its decision, NRTC has not squarely challenged the applicability of Exemption 4 to the contracts at issue. NRTC argues instead that there are public interest grounds for disclosure of the contracts. NRTC maintains that it can participate effectively in this proceeding only by comparing the programming distribution contracts between the carriers and the cable operators with the contracts between the carriers and the HSD distributors. Such comparison, NRTC claims, will allow it to assist the Commission in determining whether the subject carriers discriminate against HSD distributors.

14. We have carefully considered NRTC's arguments and concluded that, for purposes of preparing the Report to Congress on the broad issue of discrimination, it would not serve the public interest to allow indiscriminate public access to the sensitive commercial information submitted in connection with the inquiry. Although we were greatly assisted by public comment in the proceeding, the Report to Congress was not intended to adjudicate the rights of specific parties concerning the issue of discrimination -- nor, indeed, to culminate in agency rules affecting private interests. In these circumstances, we think that the disclosure policies we have followed in adjudicatory

proceedings -- which are intended in part to protect the due process rights of litigants -- apply with less force. Moreover, access to the contracts was not necessary to enable effective public participation in these proceedings. In our Report, we carefully evaluated the arguments raised by NRTC concerning the disparity in rates for these services. *See Inquiry into the Existence of Discrimination in the Provision of Superstation and Network Station Programming, Report* Gen. Docket No. 89-88, FCC 89-365, released December _____, 1989. Our Report finds that a potential problem exists in this area, and we have decided to consider this issue further in a Notice of Inquiry. *Report* at paragraphs 68, 69. As we noted in our Report, however, that inquiry will focus primarily on whether the difference in rates for these services (which is conceded) constitutes unreasonable discrimination. Resolution of that issue is not dependent on examination of the contracts themselves and, at this juncture, we have therefore determined that disclosure of the contracts to competitors is neither necessary nor justified.[12]

15. We further note that, after reviewing the documents at issue, we found no factual portions that could be reasonably segregated and disclosed. NRTC argues that we should reveal factual information such as the names of the parties to the contracts and the nature and scope of the arrangements. However, that is precisely the type of information that Exemption 4 seeks to protect. *See Landfair v. United States Department of Army*, 645 F. Supp. 325 (D.D.C. 1986); *Timken Co. v. United States Customs Service*, 531 F. Supp. 194 (D.D.C. 1981).

16. Finally, we address NRTC's contention that it is entitled to an index of all withheld documents specifying the reasons for the withholding. *See Vaughn v. Rosen*, 415 U.S. 977 (1974). The *Vaughn* index was developed as a litigation tool and there is no requirement that such an index be provided at the administrative stage of a FOIA proceeding. *See Mead Data Central, Inc. v. Department of the Air Force*, 566 F.2d 242 (D.C. Cir. 1977). While the index has become an effective measure to resolve FOIA cases, the courts have also explained that "[t]he degree of specificity of itemization, justification, and correlation required in a particular case will, however, depend on the nature of the document at issue and the particular exemption asserted." *Information Acquisition Corp. v. Department of Justice*, 444 F. Supp. 458, 462 (D.D.C. 1978). The Commission nonetheless provides an itemization of withheld documents whenever the compilation of such index is practicable and consistent with the purpose for which a particular exemption is invoked.

17. In this case, the withheld documents fall within one discrete category: the documents are contracts between the subject carriers and HSD distributors containing similar commercial information and withheld pursuant to the same FOIA exemption. The Bureau's decision provided sufficient information to allow NRTC to effectively challenge the applicability of Exemption 4. *See Airline Pilots Ass'n v. FAA*, 552 F. Supp. 811, 815 (D.D.C. 1982). Further, it would be difficult to develop a detailed index of the contracts at issue without compromising, in part, the confidentiality of the information withheld. Therefore, we find that the Bureau's determination not to provide an index of the withheld documents was appropriate.

CONCLUSION

18. In view of the foregoing, the Application for Review filed on behalf of the National Rural Telecommunications Cooperative IS DENIED. The National Rural Telecommunications Cooperative may seek judicial review of this decision pursuant to 5 U.S.C. § 552(a)(4)(B).

19. The officials responsible for this action are the following Commissioners: Alfred C. Sikes, Chairman, James H. Quello, Sherrie P. Marshall and Andrew C. Barrett.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] NRTC's Application for Review should have been filed by September 21, 1989. *See* 47 C.F.R. § 0.461(i). Because the public interest is served by resolving the issues raised by NRTC, we have waived the filing deadline prescribed by the rule and accepted NRTC's pleading.

[2] HSD owners are also referred to as "home earth station owners."

[3] Pub. L. No. 100-667, 102 Stat. 3935 (1988).

[4] The mandate to compile a report for Congress is codified at 47 U.S.C. § 713.

[5] The term "cable distributors" as used by NRTC in this context refers to cable operators who distribute programming to viewers using coaxial cable. *See* Comments of National Rural Telecommunications Cooperative in Gen. Docket 89-88 at p. 41. We note that these entities are not HSD "distributors" within the meaning of the Satellite Home Viewer Copyright Act.

[6] The Bureau indicated that, under *National Parks I*, documents may also be withheld when an agency determines that disclosure would impair its ability to obtain necessary information in the future. In this regard, the Bureau noted that the Commission has invoked this aspect of Exemption 4 where its statutory ability to secure necessary data is limited, or where the Agency has relied largely upon the voluntary assistance of subject carriers to obtain a wide range of valuable data. *See Pan American Satellite*, 4 FCC Rcd 4586 (1989); *Western Union Telegraph Company*, 2 FCC Rcd 4485 (1987). The Bureau determined that this aspect of Exemption 4 was not applicable to this case because the contracts at issue were provided in response to explicit direction by the Commission, and the carriers were subject to the Agency's jurisdiction. Thus, the Bureau could not conclude that disclosure of the requested documents would impair the Commission's future ability to gather necessary information from the carriers. Because our determination herein is based on other grounds, we do not find it necessary to examine this aspect of the Bureau's decision.

[7] Transmission services to HSD distributors may be offered by common carrier licensees, non-common carrier licensees, or non-licensees leasing satellite capacity on licensed facilities.

[8] In its application for review, NRTC also challenged Superstar's standing to respond to the *NOI* on behalf of United Video. NRTC states that Superstar is a joint venture between Amway Corporation and United, and United Video is the carrier subject to the SHVA discrimination provisions. Because

NRTC has raised this argument in the underlying *NOI* and we have addressed the issue in that proceeding, we will not consider this matter within the context of this application for review.

[9] In its "Opposition," Superstar also maintains that the contracts contain information concerning matters that are not clearly within the Commission's jurisdiction. Superstar argues that it would be inappropriate for the Commission to disclose the documents before examining the jurisdictional questions raised in Superstar's comments in response to the *NOI*.

[10] Those records amount to 218 pages.

[11] *See* note 7, *supra*.

[12] Some of the contracts submitted involve small cable systems that function as HSD distributors. In its *NOI* comments, NRTC also complained that carriers were affording those "cable-HSD distributors" more favorable rates than those afforded to other non-cable HSD distributors such as NRTC. *Report* at paragraph 53. To the extent that NRTC seeks access to the contracts to compare the rates afforded to those two types of HSD distributors, we note that our careful review of the contracts does not substantiate the claim that cable systems functioning as HSD distributors are receiving more favorable treatment than non-cable HSD distributors. In fact, we found that small cable companies operating as HSD distributors in some instances are charged rates that are higher than the rates charged to larger independent distributors (like NRTC) receiving volume discounts. *Report* at paragraphs 44, 53. Thus, there appears to be no prima facie issue of discrimination against distributors and hence no compelling reason to disclose the withheld contracts to competitors.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications Tariff F.C.C. No. 16 — Transmittal Nos. 1852 and 1993

MEMORANDUM OPINION AND ORDER

Adopted: January 19, 1990; Released: January 19, 1990

By the Chief, Common Carrier Bureau:

1. By Transmittal No. 1852, AT&T Communications (AT&T) proposes to introduce Government Outbound Calling Plan Option 1 (GOCP-1), an outbound interstate and international switched service developed by AT&T for specific government agencies of the Commonwealth of Pennsylvania. The tariff is opposed by US Sprint Communications Company Limited Partnership (Sprint) and AT&T has filed a reply. On December 27, 1989, AT&T filed Transmittal No. 1993, which revises GOCP-1 to make it generally available to institutions of higher education owned and operated by a state government or to state and local government agencies. Sprint and MCI Telecommunications Corporation (MCI) filed petitions to reject or, in the alternative, to suspend and investigate Transmittal 1993 and AT&T filed a reply.

2. Sprint argues in its petition against Transmittal No. 1852 that AT&T offers no justification for its customer-specific, discounted rates. According to Sprint, this offering is "like" Megacom except that its rates are substantially lower and it is available only to one customer in a specific location. Sprint Tr. No. 1852 Petition at 3. Moreover, Sprint maintains that AT&T cannot justify the geographically deaveraged rates on the basis that GOCP-1 recovers its costs and therefore does not threaten the goal of universal service. *Id.* at 4. Sprint also contends that the tariff violates the Commission's prohibition on resale restrictions because the combination of the geographic and customer restrictions prevents any other potential customer from subscribing to this tariff. *Id.*

3. In its reply, AT&T states that, contrary to Sprint's assertion, GOCP-1 is lawful under Section 201(b) of the Communications Act, 47 U.S.C. § 201(b). AT&T Tr. No. 1852 Reply at 2-4. AT&T also contends that GOCP-1 does not violate the Commission's policy against geographic deaveraging because GOCP-1 was developed using nationwide average costs and GOCP-1 recovers all of its costs and generates contribution to the firm's common costs. *Id.* at 5.

4. On December 27, 1990, AT&T filed Transmittal No. 1993 in which it proposes to revise GOCP-1 to make it generally available to institutions of higher education owned and operated by a state government or to state and local government agencies. Petitions to reject or in the alternative, to suspend and investigate were filed by Sprint and MCI. Sprint maintains that the proposed changes do not eliminate the highly discriminatory nature of GOCP-1. According to Sprint, the fact that AT&T offers two options for GOCP-1 is evidence that AT&T intends to retain two different Megacom discount schedules in Tariff No. 16.[1] Sprint Tr. No. 1993 Petition at 2-3.

5. MCI argues that AT&T furnishes no economic support data as required by Section 61.38 of the Rules to justify its revised tariff. MCI Tr. 1993 Petition at 3. Furthermore, MCI maintains that the revised GOCP-1 qualifies as a new service and therefore should be included in the price cap regime. *Id.* at 4.

6. In response to these petitions, AT&T argues that the Commission has previously rejected the arguments raised by the petitioners and they offer no additional arguments here which would warrant a different result. Moreover, AT&T states that its projection that there will be no additional demand for GOCP-1 is reasonable and that petitioners have not shown otherwise. AT&T Tr. 1993 Reply at 3. Finally, while AT&T disputes MCI's claim that AT&T should have supplied a cost of service study because this is a new service under price cap regulations, nonetheless, AT&T supplies such a study with its reply. *Id.* at 4 and Appendix A.

7. The Common Carrier Bureau has reviewed the tariff transmittals and the various pleadings. We conclude that no compelling argument has been presented that the tariff transmittals are patently unlawful so as to require rejection, and that no question has been presented that warrants investigation at this time.

8. Accordingly, IT IS ORDERED that the petition to reject or in the alternative to suspend and investigate AT&T, Tariff No. 16, Transmittal No. 1852, filed by US Sprint Communications Company Limited Partnership, ARE DENIED.

9. IT IS FURTHER ORDERED that the petitions to reject or in the alternative to suspend and investigate AT&T, Tariff No. 16, Transmittal No. 1993, filed by US Sprint Communications Company Limited Partnership and MCI Telecommunications Corporation IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTE

[1] The other GOCP option referred to by Sprint is contained in Transmittal No. 1876. There, AT&T proposes to offer GOCP, Option 2, to the University of Texas, Austin campus. That transmittal is pending.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
December 28, 1989

Released: January 25, 1990

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In re: Holston Valley
Broadcasting Corp.
WKTP(AM), Jonesboro, TN
Application for Assignment of License
File No. BAL-880711EA

Dear Messrs. Kelly and Martin:

This refers to the application for Commission consent to the assignment of license of Station WKTP(AM) (formerly WUSJ), Jonesboro, Tennessee, from Eaton Govan, III and Berton Cagle, Jr., to Holston Valley Broadcasting Corporation ("Holston"), and the petition to deny that application filed on behalf of Tri Cities Radio Corporation ("Tri Cities").[1]

Holston is the licensee of WKPT(AM), WTFM(FM), and UHF television station WKPT(TV), serving the Bristol-Kingsport-Johnson City market. This represents a "grandfathered" exception to the Commission's one-to-a-market rule, 47 C.F.R. Section 73.3555(b), which prohibits common ownership of radio and television stations in the same market. The above-referenced application to acquire WKTP(AM) in Jonesboro, Tennessee, which is also in the Bristol-Kingsport-Johnson City market, is subject to the Commission's one-to-a-market rule since the Grade A contour of WKPT(TV) encompasses the entire community of license of WKTP(AM).

Holston argues that its acquisition of WKTP(AM) would result in economic benefit to both WKTP(AM) and WKPT(TV), and would be in the public interest. Holston maintains that WKPT(TV), which has struggled from its inception in 1969, did not make a profit during most of its first decade on the air, and suffered losses in 1987. Holston's pre-audit financial report for calendar year 1988 revealed further losses for WKPT(TV). Holston argues that the combined ownership of WKPT(TV) and WKTP(AM) would also serve the public interest by improving service on WKTP(AM), a station with a history of financial difficulty. Specifically, WKTP(AM) was operated by a receiver until its present owners purchased the station "out of bankruptcy" in 1986. An attempt to provide separate programming on the station ended in failure, with no impact on the Arbitron ratings and total sales revenues for 10 months of only $2,100. Accordingly, WKTP(AM) no longer provides programming diversity from its FM counterpart. As a result of its financial condition, WKTP(AM) currently has no fulltime news and public affairs staff. In addition, the present licensee of WKTP(AM) is contemplating the elimination of nighttime service on the station in order to avoid the expense of maintaining two separate transmission facilities used to provide both day and nighttime service. In fact, the present licensee states that it has given notice to the owners of the nighttime site of its intention to vacate the site for economic reasons.

Furthermore, Holston claims that both WKPT(AM) and WKTP(AM) will benefit by the economies of joint ownership and operation, and that their presence will be strengthened by Holston's broadcast experience and ties to the community. As previously noted, Holston argues that its acquisition of WKTP(AM) would be in the public interest because it would continue to provide nighttime service for WKTP(AM), and because its programming would include a unique musical format, coupled with extensive news and public affairs coverage.

Further, Holston also maintains that the Bristol-Kingsport-Johnson City ADI, the 86th television market in the country, will continue to have a diversity of viewpoints because it is served by 31 voices, including 18 AM and 9 FM stations located within the metropolitan area, and 6 TV stations within the ADI. Holston also asserts that there is approximately 64 percent cable penetration in the market, with 15 different owners of systems located in the seven-county metropolitan area, with an additional 33 owners of systems located in the balance of the ADI. Additionally, five daily and six weekly newspapers are published within the Bristol-Kingsport-Johnson City Metro area with a combined circulation of 162,885. Finally, Holston states that WKPT(AM), which operates with the maximum 1,000 watts, is precluded by mountainous terrain, extremely low ground conductivity and the crowded nature of its Class IV frequency assignment of 1400 kHz from providing a competitive signal or at night, any signal, to the Jonesboro area.

In the *Second Report and Order* in MM Docket No. 87-7, 4 FCC Rcd 1741 (1989), the Commission set forth standards regarding waivers of the one-to-a-market rule. The Commission stated it would look favorably upon waiver requests in two situations: (1) in the top 25 ADI markets as defined by Arbitron Ratings Company where, after the combination, there would be at least 30 separately owned, operated and controlled broadcast licensees; and (2) where a station has not been operating or is involved in bankruptcy proceedings. *Id.* at 1751-1752. Other situations would be examined on a case-by-case basis, based on a balancing of the following factors: (1) public service benefits such as economies of scale, cost savings and programming and service benefits; (2) types of facilities involved; (3) ownership by the applicant of other media outlets in the market; (4) financial difficulties, in particular, whether the station has been offered for sale; and (5) nature of the market in light of traditional diversity and competition concerns. *Id.* at 1753.

On reconsideration, the Commission stated that not all of the factors mentioned with respect to its case-by-case analysis will be relevant in every case. *Memorandum Opinion and Order* in MM Docket No. 87-7, 4 FCC Rcd 6489, 6491 (1989). In particular, the Commission stated:

> In smaller markets, where competition is usually more limited, of particular importance would be demonstrated financial difficulties and the practical question of whether a waiver grant, by permitting continued viable service from an existing station or the activation of a new station, would in fact increase or decrease the vigor of competition and diversity in the market. Consistent with the Court's instructions in *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969) and *Melody Music, Inc. v. FCC*, 345 F.2d 730 (D.C. Cir. 1965), we will endeavor to treat all waiver petitions, both within and outside the top 25 largest markets, that are shown to be factually comparable in a comparable manner.

Id. at 6492.

Applying the standards for case-by-case analysis set forth in these orders to the specific facts before us, we conclude that waiver of the one-to-a-market rule in this case would serve the public interest, convenience and necessity. Of particular importance to our decision is the severe financial difficulties of this small market station. The station was operated by a receiver until its present owners purchased the station out of bankruptcy in 1986 and it is apparent that WKTP(AM) never fully recovered from that bankruptcy. An attempt to provide separate programming on the station ended in failure, with no impact on the Arbitron ratings and total sales revenues for 10 months of only $2,100. Further, the station did not make a profit during most of its first decade on the air, and has continued to suffer losses. In short, WKTP(AM)'s history suggests it is virtually a failed station. Moreover, we note that the waiver will not result in an undue concentration of the media nor create any detriment to the diversification policies underlying the multiple ownership rules since there will remain 30 or more separate voices after the assignment is consummated.

Accordingly, Holston Valley Broadcasting Corporation's request for waiver of the one-to-a-market provisions of Section 73.3555 of the Commission's rules, IS HEREBY GRANTED. Moreover, upon a finding that the applicant is qualified and the public interest will be served, the application to assign the license of WKTP(AM) from Eaton Govan, III and Berton Cagle, Jr., to Holston Valley Broadcasting Corporation IS GRANTED.

BY DIRECTION OF THE COMMISSION

Donna R. Searcy
Secretary

FOOTNOTE

[1] Tri Cities has alleged that prohibited overlap exists between the predicted 1 mV/m contours of WKPT(AM), a station owned by Holston, and WKTP(AM). However, in *First Report and Order* in MM Docket No. 87-7, 4 FCC Rcd 1723 (1989), the Commission modified its rules to prohibit common ownership of two or more commercial AM stations only if overlap exists between their 5 mV/m contours. Engineering studies reveal that the 5 mV/m contours of WKPT(AM) and WKTP(AM) do not overlap. On November 30, 1988, Tri Cities requested the dismissal of its petition to deny, stating that "Tri Cities has no further objection to a grant of the multiple-ownership rule waivers requested by the parties to the assignment." Accordingly, Tri Cities' petition to deny will be dismissed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

QUEEN CITY CELLULAR COMMUNICATIONS — File No. 74656-CL-P-251-A-86

For Authority to Construct and Operate a Domestic Public Cellular Radio Telecommunications Service on Frequency Block A in the Williamsport, Pennsylvania Metropolitan Statistical Area

In re Application of

MILLER PARTNERSHIP — File No. 98551-CL-P-251-A-86

For Authority to Construct and Operate a Domestic Public Cellular Radio Telecommunications Service on Frequency Block A in the Williamsport, Pennsylvania Metropolitan Statistical Area

In re Application of

DAWURSK PARTNERSHIP — File No. 89664-CL-P-251-A-86

For Authority to Construct and Operate a Domestic Public Cellular Radio Telecommunications Service on Frequency Block A in the Williamsport, Pennsylvania Metropolitan Statistical Area

ORDER ON REVIEW

Adopted: January 18, 1990; Released: January 25, 1990

By the Commission:

1. Queen City Cellular Communications (Queen City) has filed an application seeking Commission review of an Order on Reconsideration (Order) released by the Common Carrier Bureau.[1] Miller Partnership (Miller) has filed an application seeking Commission review of the decision of the Mobile Services Division (MSD) to dismiss its application.[2] Queen City and Miller have entered into a settlement agreement for the Williamsport, Pennsylvania Metropolitan Statistical Area (MSA). Queen City also filed a contingent motion to dismiss its application pending a grant of the Miller application for review. We consolidate the above-captioned applications in this Order on Review.

I. BACKGROUND AND CONTENTIONS

2. Queen City's application was selected first in the Block A Williamsport, Pennsylvania MSA cellular lottery. Miller was the second-ranked applicant. [3] On December 10, 1986, Queen City's application was dismissed by the MSD because Queen City had not submitted a full-sized 1:250,000 scale map as required by Sections 22.903(a) and 22.913(a)(2) of the Commission's Rules and that the reduced map which was submitted failed to provide longitude and latitude depictions as required by Section 22.2 of the Rules. Similarly, on April 29, 1988, Miller's application was dismissed as defective by the MSD because Miller failed to provide a map of the proposed CGSA drawn to a scale of 1:250,000 and failed to indicate longitude and latitude as required by the Rules. Queen City filed a petition for reconsideration, which was denied, *see* n.1, *supra*, and Miller filed an application for review. On July 13, 1988, the Dawursk Partnership, originally the third-ranked applicant was named tentative selectee for the Williamsport, Pennsylvania MSA.

3. In their applications for review, both Queen City and Miller argue that the proper map was inadvertently omitted from its original filing due to a clerical error, and that the submission of an amendment with the proper scale map was timely filed, corrected the deficiency, and should have been permitted by the MSD. On November 7, 1988, Queen City filed a supplement to its application for review to bring to the Commission's attention the decision regarding Queen City's appeal of *Timothy Donald Engelgau*, 2 FCC Rcd 6909 (1987) (*Engelgau*), filed in the United States Court of Appeals for the District of Columbia. *Queen City Cellular Communications v. Federal Communications Commission*, No. 87-1757 (D. C. Circuit, October 7, 1988) (*Queen City*). In *Queen City*, the Court of Appeals upheld the Commission's exercise of discretion in accepting Engelgau's application for the Bradenton, Florida, MSA, in view of the temporary unavailability of a conforming map from the United States Geological Survey, and the fact that Engelgau requested a waiver of the Rules to submit a nonconforming map. Queen City argues that both the Engelgau and the Queen City/Miller applications contained similar deficiencies and that dismissal of the Queen City/Miller applications is inconsistent with Commission precedent and the Court's decision in *Queen City*.

II. DISCUSSION

4. The issues raised by Queen City in its application for review are virtually identical to those raised in its petition for reconsideration and its appeal to the United States Court of Appeals. Similarly, the issues raised by Miller are identical to those raised by Queen City. In its Order on Reconsideration, the Common Carrier Bureau correctly upheld the MSD's dismissal of Queen City's application as defective because it did not comply with Sections 22.903(a) and 22.913(a)(2)[4] or include a request for a waiver or an explanation as to why the full-sized 1:250,000 scale map was not included in its application. In addition, the reduced map that Queen City did submit failed to contain the latitude and longitude markings re-

quired by Section 22.2.[5] We find that the MSD did not err in its finding that both the Queen City and Miller applications were defective as filed.

5. Equally unavailing are applicants' claims that their subsequent submission of full-size maps be classified as "curative amendments" under Section 22.23(g)(5). In *REM Communication*, 3 FCC Rcd 3705 (1988), we reaffirmed the MSD's dismissal of applications based on the ground that an illegible map without longitude and latitude markings renders the application unacceptable for filing.[6] Based on deficiencies in their map exhibit, we concluded in *REM Communication* that any curative amendment from REM would not be appropriate after we processed its application -- that is, selected it in the lottery -- and determined that REM's application was not acceptable for filing. Similarly, we find that the Queen City and Miller applications were not acceptable for filing because their map exhibits were illegible and lacking in longitude and latitude markings. As was the case in *REM Communication*, the Queen City and Miller maps were so illegible that it was impossible to determine any latitude, longitude or proper scale markings. Such a map, lacking in legible coordinates, prevents the application from being reviewed by staff engineers. Without coordinates, staff engineers are unable to verify that the cell sites are properly plotted on the map. The absence of an acceptable map rendered the applications incomplete[7] and unacceptable for filing. In *Round IV Cellular Applications*, 3 FCC 2d 366 (1986), the Commission ruled that omission of latitude and longitude indications from an applicant's map is not a minor defect but rather renders the application "blatantly defective and unacceptable for filing." Further, the Commission stated that applications which "either omit very significant information or provide it in practically useless form" have been defined as blatantly defective. We conclude that the applications at hand were properly dismissed as defective and unacceptable for filing.

6. Furthermore, with regard to Queen City's argument regarding *Queen City*, *supra*, we find the Queen City/Miller cases to be clearly distinguishable. In *Queen City*, the tentative selectee submitted a 1:500,000 map with its application and was permitted by the MSD to submit the proper scale map with its Section 1.65 amendment because the applicant had previously submitted a request for a waiver of Sections 22.903(a) and 22.913(b) of the Rules, pointing out that it was unable to secure a copy of a 1:250,000 scale map from the U.S. Geological Survey. Neither the Queen City nor the Miller application included an explanation of why the proper scale map was not included with a waiver request. The United States Court of Appeals found that the Commission reasonably exercised its discretionary power in accepting Engelgau's application "in view of the temporary unavailability of a conforming map from the United States Geological Survey, a situation flagged by the applicant in a waiver request." *Queen City*, slip op. at 2. Queen City and Miller failed explain the deficiency or to request a waiver of the pertinent rules. We find the MSD's decision to deny their applications for review consistent with *Queen City*. After consideration of all the facts and contentions set forth above, we deny the Queen City and Miller applications for review.

7. In addition, we find the Dawursk Partnership to be legally, technically and otherwise qualified to construct and operate the proposed cellular system and that granting the instant application will serve the public interest, convenience and necessity.

III. ORDERING PARAGRAPHS

8. Accordingly, IT IS ORDERED, that the application for review filed by Queen City Cellular Communications, Inc. IS DENIED.

9. IT IS FURTHER ORDERED, that the application for review filed by Miller Partnership IS DENIED.

10. IT IS FURTHER ORDERED, that the application of the Dawursk Partnership, File No. 89664-CL-P-251-A-86 for the Williamsport, Pennsylvania MSA IS GRANTED. This authorization does not include the right to any interference protection in any areas outside the Williamsport, Pennsylvania MSA and is also conditioned upon coordinating with the current or future co-channel licensee(s) in the areas outside the MSA. The licensee herein is put on notice that in the event current or future MSA/RSA licensee(s) encounter any interference from any extensions, the licensee will have to change frequencies in those cells or pull back its 39 dbu contours to eliminate any interference due to an extension.

11. IT IS FURTHER ORDERED, that all non-wireline cellular applications in the Williamsport, Pennsylvania MSA, other than the application of the Dawursk Partnership ARE HEREBY DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] 2 FCC Rcd 7092 (Com. Car. Bur., 1987). Queen City's petition for reconsideration sought review of a Mobile Service Division (MSD) Dismissal Letter dated December 10, 1987.

[2] Letter from Chief, MSD to Miller Partnership, 63500-DL (April 29, 1988).

[3] Queen City: Public Notice, Mimeo No. 0872 (released November 28, 1986). Miller: Public Notice, Report No. CL-88-38 (released December 7, 1987).

[4] Section 22.903(a) of the Commission's rules requires that the Cellular Geographic Service Area of the cellular system be "drawn on one or more U.S. Geological Survey maps(s) with a scale of 1:250,000." Section 22.913(a)(2) of the Commission's rules requires that the applicant submit an exhibit containing, *inter alia*, an "8 1/2 by 11 inch reduced copy of the 1:250,000 scale map required by |Section| 22.903(a)."

[5] Section 22.2 of the Commission's rules defines a map as "[A] representation on a flat surface, of a part or the whole of the earth's surface. All maps submitted under this part shall include latitude, longitude and scale." 47 C.F.R. Section 22.2. *See Cellular Application Filing Procedures: An Update*, 52 Rad. Reg. (P&F) 2d 725 (1982).

[6] REM's application also contained defects regarding various inconsistencies as to the applicant's filing status.

[7] We note that pursuant to Section 22.913 of the Rules, all applicants must certify that their applications are "complete in every respect." Even a cursory examination of the maps submitted by applicants should have demonstrated that the map exhibits were not complete.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Allocation of the 50-54 MHz
Frequency Band for a New FM
Broadcast Service

ORDER

Adopted: January 18, 1990; Released: January 25, 1990

By the Commission:

1. Before the Commission is an Application for Review filed by Radio New Jersey (RNJ) on May 17, 1989.[1] RNJ requests that the Commission review staff actions that dismissed a Petition for Rule Making filed by RNJ on January 5, 1989. In that petition, RNJ requested reallocation of the 50-54 MHz frequency band from the amateur radio service to a new FM broadcast service, to be known as "FM2." RNJ argued that this new broadcast service is needed to provide relief for day-time only AM stations, limited time and low power AM stations, and certain low power FM stations.

2. RNJ's Petition for Rule Making was dismissed by the Commission's Chief Engineer in a letter of February 15, 1989. The dismissal indicated that RNJ had failed to consider adequately important issues concerning the impact its proposal would have on amateur radio communications, both domestically and internationally, and therefore did not warrant consideration by the Commission. RNJ filed a Petition for Reconsideration of the dismissal on March 17, 1989, arguing that the Chief Engineer's dismissal reflected incorrect assumptions and analyses. The Chief Engineer denied RNJ's Petition for Reconsideration in a letter of May 19, 1989, again indicating that RNJ had not adequately addressed the amateur issues. In its Application for Review, RNJ requests that the Commission accept the Petition for Rule Making and request public comment on the proposed reallocation of the 50-54 MHz band for an FM2 broadcast service.

3. Upon examination of RNJ's Petition for Rule Making, Petition for Reconsideration, and Application for Review, we agree with the Chief Engineer's previous findings in this matter. RNJ has presented no new arguments or information to persuade us that its proposal for reallocating the 50-54 MHz band from the amateur radio service to a new broadcast service warrants consideration. In particular, the petitioner has not provided a satisfactory demonstration that amateur operations at 50-54 MHz could be accommodated elsewhere in the spectrum or that broadcast operations in this band would not cause interference to international amateur communications. We therefore affirm the staff decisions. Accordingly, pursuant to Section 1.115(g) of the Commission's rules, 47 C.F.R. Section 1.115(g), Radio New Jersey's Application for Review IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTE

[1] RNJ is the licensee of WRNJ-AM, a 2.5 kW AM day-time only radio station located in Hacketstown, NJ.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

ROBERT L. KILE File No. 00376-CL-AL-87

For consent to the assignment of
the license for Station KNKA598
operating in Domestic Public
Cellular Radio Telecommunications
Service in the Fort Myers,
Florida Metropolitan Service
Area (MSA)

MEMORANDUM OPINION AND ORDER

Adopted: January 18, 1990; Released: January 25, 1990

By the Commission:

I. BACKGROUND

1. In August 1987, Robert J. Kile (Kile) filed an application to assign its cellular radio license for Domestic Public Cellular Radio Telecommunications Service (DPCRTS) Station KNKA598 to Palmer Communication, Inc. (Palmer).[1] P&T Communications (P&T), an entity holding a minority interest in that station license, filed a petition to dismiss or deny the assignment application. In its Petition to Deny, P&T argued that (1) Palmer's assignment application failed to present the financial showings required by Section 22.917(d) of the Rules; (2) Kile's June 1986 amendment to its application, and its August 1987 assignment application contained inconsistent statements; and (3) the Commission should void as against public policy a settlement agreement provision prohibiting petitions to deny by its signatories. On March 8, 1988, the Mobile Services Division (MSD) denied P&T's Petition to Deny and granted the application for assignment. *Robert J. Kile*, 3 FCC Rcd 1087 (Mob. Serv. Div. 1988) (*Kile*). In *Kile*, the MSD held that Palmer had demonstrated that it had the funds available to acquire the Fort Myers facility. The MSD stated that Palmer had submitted a financial commitment letter indicating that the Bank of New York would lend Palmer a total amount substantially in excess of the purchase price of the facility. Thus, the MSD found that Palmer complied with the financial qualification requirements of Section 22.917(d) of the Rules. In addition, the MSD held that it would not void a provision of the Fort Myers' settlement agreement which prohibits its signatories from filing petitions to deny. The MSD found that the issue raised by P&T is a private contractual matter best resolved by negotiation or by the courts. On April 11, 1988, P&T filed an application for review of the MSD's decision in *Kile*. Responsive pleadings were filed.

2. In its Application for Review, P&T argues that the MSD erred in finding Palmer financially qualified and that the MSD should have declared the provision of the Ft. Myers settlement agreement prohibiting petitions to deny void as against public policy. Kile and Palmer have filed oppositions. P&T has filed a reply.[2]

II. FINANCIAL QUALIFICATION

A. Contentions of the Parties

3. P&T argues that the MSD misconstrued the financial requirements of Section 22.917 of the Rules. Section 22.917(d) requires, P&T argues, the proposed assignee also to submit information required under the guidelines of Section 22.917(a) of the Rules, i.e., the estimated costs of construction or operation, balance sheet, income statement, statement of projected revenues and expenses, and a statement of projected sources and application of funds. P&T further argues that because Palmer's bank letter does not specify an interest rate, it does not contain a sufficient description of the terms of the loan as required by Section 22.917(d) of the Rules.

4. Moreover, P&T argues, the MSD lacked a rational basis upon which to find Palmer financially qualified. Financial qualification must be demonstrated, P&T argues, by a showing of sufficient net liquid assets or total assets [3]--not by a showing that the applicant has a substantial financial cushion over the acquisition cost. P&T asserts that " *any* finding of financial qualifications *must* compare an applicant's financial resources on the one hand, with its estimated capital and operating expenses, on the other." Application at 4 (emphasis in original). In the absence of information concerning Palmer's resources and costs, P&T concludes that the MSD determination was in error.

5. In opposition, Palmer states that Section 22.917(a) is not applicable to applications for assignment or transfer of control. Section 22.917(a), Palmer asserts, specifically exempts these applications from its requirements.[4] Palmer further asserts that the Ft. Myers assignment application fully complies with the requirements of Section 22.917(d). Palmer states that it is an experienced communications provider whose financial qualifications are a matter of record before the Commission. In addition, Palmer contends that its loan commitment letter contains the information necessary to establish the availability of the funds to complete the assignment.

6. In its opposition, Kile states that P&T's interpretation of the requirements of Section 22.917(d) of the Rules is contrary to the plain language of the rule and prior case law. Kile asserts that it is absurd to suggest that a proposed assignee must include estimated costs of construction in an application for a system already constructed. The appropriate cost figure in the case of a constructed system, Kile contends, is the purchase price of the facility. In *WKBD, Inc*., 2 FCC Rcd. 2488 (Mob. Serv. Div. 1988), Kile asserts that the MSD held that estimated operating costs also do not need to be provided when applying to transfer an operating facility. In addition, Kile asserts that the Commission has held that a statement of the applicable interest rate is not required in a bank commitment letter.

7. In reply, P&T argues that the Commission's cellular decisions clearly recognize that indication of the interest rate is an essential term which must be disclosed in a financial commitment letter, and cites *Cellular Communications of Cincinnati*, 53 Rad. Reg. 2d (P&F) 827 (Com. Car. Bur. 1983).

B. Discussion

8. Section 22.917(d) provides, in pertinent part, that an application for an assignment of license (or permit) or transfer of control of a cellular license (or permit) " . . . shall demonstrate the financial ability of the proposed assignee or transferee to acquire and operate the facility by submitting adequate financial information under the guidelines specified in this section, *as appropriate* (emphasis added)." The Commission has previously stated that the requirement that the applicant demonstrate the financial ability to operate the station for one year refers to unbuilt facilities, and not to operational facilities.[5] When an operational facility is sought to be transferred, a transferee need only demonstrate its ability to finance the acquisition of the facility. Moreover, an applicant, not relying on internal financing, may demonstrate its financial ability by filing a financial commitment letter, and is not required to file a balance sheet.[6] Finally, additional information such as an income statement, statement of projected revenues and expenses, statement of projected sources and application of funds is required only when the financial showing submitted is insufficient.[7]

9. The standard of financial ability applicable to an assignment or transfer of license is one of reasonable assurance that the funds will be available. *CNCA Acquisition Corporation, supra.* Palmer has obtained a financial commitment letter from the Bank of New York which demonstrates a reasonable assurance that a loan of $10 million is available to Palmer for acquiring the facility. The letter provides, in pertinent part that, "This is to confirm that the Bank of New York ("Bank") is willing to lend Palmer Communications Incorporated ("Palmer"), a total of $10 million subject to our mutual agreement on normal terms and conditions." The letter further states that the term of years for the loan would not exceed ten years, and that amortization would began two years after the loan was established. The bank letter sets forth the sufficient terms of the loan to demonstrate that the lender will make financing available, and thus, is in compliance with the reasonable assurance standard.[8] *See generally American Lo - Power TV Network, Inc.*, 103 FCC 2d 4, 10 (1986). In addition, Palmer's loan commitment will provide Palmer with funds for working capital well in excess of the $5,100,000 purchase price of the facility.[9] Finally, as previously stated, the requirement that an applicant demonstrate its ability to operate the proposed station one year after the transfer refers only to unbuilt facilities and not to operational facilities. The Fort Myers facility is operational and therefore, it is unnecessary for Palmer to demonstrate the financial ability to operate the system. Accordingly we find that the MSD properly applied the financial requirements of Section 22.917 of our rules, and that Palmer is financially qualified to be the assignee of Station KNKA598.

III. SETTLEMENT AGREEMENT PROVISION

A. Contentions of the Parties

10. P&T also argues that the MSD erred in not declaring Section 6.7 of the Ft. Meyers settlement agreement void as against public policy. Section 6.7 prohibits its signatories from filing petitions to deny against the applications of the members of the settlement group.[10] However, P&T argues, to the extent that this provision is construed to prohibit the signatories from filing petitions to deny against other, subsequently-filed, non-mutually exclusive applications, this provision should be declared void as against public policy.

B. Discussion

11. We find it unnecessary to resolve the question of whether Section 6.7 of the settlement agreement should be declared void as against public policy. Generally, the Commission will not enforce or interpret settlement agreements among cellular applicants. *Guidelines for Settlement and Changes in Ownership of Cellular Systems*, 59 Rad. Reg. 2d (P&F) 1450 (Com. Car. Bur. 1986). The validity of a settlement agreement is, as the MSD correctly stated, a private contractual matter best resolved by negotiation of the parties or by the courts. In addition, we note that P&T did in fact file a petition to deny against the assignment application and that the MSD considered the petition on its merits and denied it.[11] Moreover, we have reviewed the allegations raised by P&T in its application, and concur with the findings of the MSD. In these circumstances, P&T's arguments on this point warrant no further consideration.

IV. ORDERING CLAUSE

12. Accordingly, IT IS HEREBY ORDERED, that the Application for Review filed by P&T Communications IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Kile's initial application for a construction permit was granted on January 28, 1987. *Robert J. Kile*, 2 FCC Rcd 583 (Mob. Serv. Div. 1987).

[2] P&T has also filed a Petition to Deny Palmer's application for a major modification of the Fort Myers system, and a Motion to Consolidate that proceeding with this one. We do not find that consolidation of these proceedings to be in the public interest, and therefore, deny P&T's request.

[3] "Net liquid assets" represents the excess of current assets readily converted to cash over current liabilities.

[4] In support of its assertion Palmer quotes the language of Section 22.917(a)(3) which provides, "Except as provided in paragraph (d) of this section, each application shall demonstrate an applicant's financial ability as set forth in paragraph (a)(1) of this section, the information required by paragraph (a)(3)(iii) of this section, and whatever other information the Commission may require . . . ." Section 22.917(d) applies to assignment of licenses (or permits) and transfers of control of a corporation holding a license (or permit). *See* n. 5, *infra*.

[5] *See CNCA Acquisition Corporation*, 3 FCC Rcd 6088, 6094 at n. 8 (1988). Such transfers generally do not raise questions with regard to speculative and insincere applicants as does the transfer of a bare construction permit. For this reason, the proposed transfer of a bare construction permit requires the proposed transferee to demonstrate the financial ability to construct and

operate the system for one year. *See McCaw Personal Communications, Inc.*, 60 Rad. Reg. 2d (P&F) 889, 895 (Com. Car. Bur. 1986).

[6] *See* Section 22.917(a)(3) of the Rules. A proposed assignee or transferee intending to rely on internal financing to fund the acquisition of the facility would be required to submit a balance sheet.

[7] Section 22.917(a)(3)(ii) of the Rules.

[8] Contrary to P&T's arguments, *Cellular Communications of Cincinnati, Inc., supra*, does not require that the commitment letter state the interest rate with specificity. "[E]xact details such as interest rates and payment terms are not absolutely required . . . ." *Id.* at 830. *See also Bluegrass Broadcasting Co., Inc.*, 2 FCC Rcd 439 (Com. Car. Bur. 1987) ("It is not necessary that the commitment letter specify the interest rate with specificity . . . ")

[9] Notwithstanding that the transferee of an operating system need not show the ability to operate the system, $10 million appears to be sufficient to cover not only the $5.1 million purchase price, but also reasonably anticipated operating costs. In the original applicant's cost projections it estimated that it would cost $861,270 to operate the system for one year. Because Palmer purchased the system within a month after the original applicant received its construction authorization, it is reasonable to continue to rely on this estimate. Therefore, it appears that Palmer had sufficient funds to both acquire and operate the system for one year.

[10] Section 6.7 provides "Each applicant agrees that it will not directly or indirectly petition to dismiss or deny or otherwise object to the DPCRTS application of any other Party to this Agreement."

[11] The Commission may refuse to accept a settlement agreement if its provisions violate Commission rules or policies. *See Ninety - Two Point Seven Broadcasting, Inc.*, 55 Rad. Reg. 2d (P&F) 607, 610-611 (1984); *Advanced Mobile Phone Service, Inc.*, 53 Rad. Reg. 2d (P&F) 1127,1135 (1983). Generally, we would hold that an agreement to withhold evidence of a serious violation of the Act or the Commission's Rules would be void as against public policy. However, Section 6.7 of the agreement does not have such sinister overtones and appears to be typical of settlement agreements in that it seeks to enforce a settling party's expectation that no further litigation will be brought by the settling parties. Notwithstanding the foregoing, the provision at issue did not in fact prevent P&T from filing a petition to deny, and as such did not interfere with our ability to obtain from interested parties factual information the Commission needed to determine whether grant of the application would be in the public interest. *See* 47 U.S.C. §309(d); *Faulkner Radio, Inc. v. FCC*, 557 F. 2d 866, 875 (D.C. Cir. 1977).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Matter of the Application of

Thomas Glab File No. 4986-CM-P-83

For Authority to Construct and Operate
a Multichannel Multipoint Distribution
Service Station on E-group Channels
at Colorado Springs, Colorado

MEMORANDUM OPINION AND ORDER

Adopted: January 19, 1990; Released: January 25, 1990

By the Chief, Domestic Facilities Division:

1. *Introduction*. The above-referenced application of Thomas Glab to construct and operate a Multichannel Multipoint Distribution Service (MMDS) station on the E-group channels to serve the Colorado Springs, Colorado area was selected for qualification review as the result of a Commission lottery. Microband Corporation of America (Microband) filed a post-lottery Petition to Deny,[1] challenging the application. Thomas Glab filed an Opposition to the Petition to Deny.

2. *Pleadings*. In its Petition, Microband alleges that Glab, together with eleven other MMDS applicants,[2] engaged in an orchestrated attempt to skew the Commission's lottery proceedings by the coordinated and systematic filing of virtually identical applications. All twelve of these applicants filed applications for Colorado Springs. Microband contends that the events leading up to the filing of these "cookie-cutter" applications, the familial or business relationships among certain applicants, the central role that at least two of the applicants played in the preparation of the applications, and the similarities in technical and other information among the applications should lead the Commission to conclude that Glab failed to disclose the identity of the real-parties-in-interest to his application in violation of Section 21.13(a) of the Commission's Rules, 47 C.F.R. § 21.13(a), and filed multiple applications in violation of Section 21.901(d)(2) of the Commission's Rules, 47 C.F.R. § 21.901(d)(2), also known as the one-to-a-market rule. Microband also contends that Glab has not adequately demonstrated his financial qualifications to be an MMDS licensee in violation of Section 21.17 of the Commission's Rules, 47 C.F.R. § 21.17.

3. In his opposition, Glab notes that Microband's Petition to Deny does "not contain a single affidavit in support of [Microband's] petition nor is there any proof or substantive evidence to substantiate [Microband's] allegations." Opposition at 2. Glab relies upon his sworn affidavit to support his assertion that he has not violated the real-party-in-interest and one-to-a-market rules. Responding to the allegation that he failed to adequately demonstrate his financial qualifications to construct and operate the above-referenced MMDS station, Glab submits an updated financial statement.

4. *Discussion*. The Court of Appeals for the District of Columbia Circuit in a recent line of cases clarified and reaffirmed the Commission's statutorily prescribed two-step process for determining the sufficiency of a petition to deny. *See, e.g., Beaumont Branch of the NAACP v. FCC*, 854 F.2d 501 (D.C.Cir. 1988)(hereinafter cited as *Beaumont); Gencom, Inc. v. FCC*, 832 F.2d 171 (D.C.Cir. 1987). It is well established in these cases that in order to obtain an evidentiary hearing, the proponent of a petition to deny must "first set forth specific allegations of fact sufficient to show . . . that a grant of the application would be *prima facie* inconsistent with the public interest, convenience, and necessity." 47 U.S.C. § 309(d)(1). Second, if the petition meets these requirements, then and only then, must the Commission determine whether, on the basis of the application, the pleadings filed, or other matters which the Commission may officially notice, a substantial and material question of fact is presented. 47 U.S.C. § 309(d)(2). If no substantial or material question of fact is presented, no evidentiary hearing need be held. *Citizens for Jazz on WRVR, Inc. v. FCC*, 775 F.2d 392, 394 (D.C. Cir. 1985)(hereinafter cited as *Jazz)*.

5. The *prima facie* sufficiency determination is to be made on the assumption that the specific facts set forth by the complaining party are true, and without reference to contrary evidence. *Id.* at 397. In other words, the Commission must perform this threshold inquiry on the basis of the petitioner's allegations alone. The Commission is limited to consideration of the petition and its supporting affidavits during this initial inquiry. *Astroline Communications Co. v. FCC*, 857 F.2d 1556 (D.C.Cir. 1988)(hereinafter as *Astroline)*. In the instant case, Microband alleges the apparent existence of real-party-in-interest rule, one-to-the-market rule, and financial qualification violations. After consideration of Microband's allegations, as required under 47 U.S.C. 309(d)(1), we are persuaded that the asserted violations, standing alone, and, if assumed to be true, would sufficiently establish that grant of the subject application would be *prima facie* inconsistent with the public interest, convenience and necessity. Proof that Glab failed to disclose the real-parties-in-interest and filed multiple applications would alter the Commision's public interest determination. *Astroline*, 857 F.2d at 1563, 1573; *see, e.g., David Lausisen and Broadcast Data Corp.*, 3 FCC Rcd 2053 (Comm.Carr.Bur. 1988); *KIST Corp.*, 99 FCC 2d 173 (Rev. Bd. 1984), *aff'd as modified*, 102 FCC 2d 288 (1985), *aff'd sub nom. United American Telecasters, Inc. v. FCC*, 801 F.2d 1436 (D.C.Cir. 1986), *cert. denied*, 107 S.Ct. 2182 (1987); *Midland Educational Broadcasting Foundation*, 4 FCC Rcd 5207 (Audio Serv. Div. 1989).

6. Having found that the petition to deny comports with the requirements enunciated at 47 U.S.C. § 309(d)(1), we now reach the question of the substantiality[3] or materiality of the facts presented as required by Section 309(d)(2). In determining whether an evidentiary hearing is warranted, the Commission considers the totality of the evidence presented (petitioner's evidence and facts offered in rebuttal). Microband's allegations with regard to violations of the real-party-in-interest and one-to-a-market rules are based upon the same circumstances,[4] therefore we will consider them together.

7. The test for determining whether a person is a real-party-in-interest[5] is whether that person has an ownership interest, or is or will be in a position, actually or potentially, to control the operation of the station. *San Joaquin*

Television Improvement Corp., 2 FCC Rcd 7004, 7008 (1987); *KOWL, Inc.*, 49 FCC 2d 962, 964 (Rev. Bd. 1974). The one-to-a-market rule prohibits, *inter alia*, the filing of multiple applications.[6] Microband's allegations of rule violations are based upon evidence that "cookie-cutter" applications were filed and that both Glab and Joseph W. Hubbard held partnership interests in Warren Electronics, Inc. and in Hydra Communications, Inc. However, as Microband recognized, "Applications that are totally unrelated may be similar as a result of the coincidental use of common engineering and legal consultants."[7] In his Opposition, Glab states in rebuttal:

> There were no agreements or understandings existent or under negotiation at the time of the filing of these applications which affected the ownership or control of the proposed facilities, or any right or interest therein by any person not a party to my application. In addition, there are no agreements or understandings regarding ownership or control at this time.

Opposition at 2. We find Microband's unsubstantiated evidence insufficient to establish the existence of a real-party-in-interest violation or a one-to-the-market rule violation in light of Glab's rebuttal. *Sherry Rullman and Edna Cornaggia*, 2 FCC Rcd 2011 (1987); *Virginia Communications, Inc.*, 2 FCC Rcd 1895 (1987).

8. With regard to Microband's allegation that Glab failed to adequately demonstrate his financial qualifications pursuant to Section 21.17, we note that since Microband's petition to deny was filed, the Commission revised rule Section 21.17 in *Revision of Part 21 of The Commission's Rules*, 2 FCC Rcd 5713 (1987), to allow new applicants to submit a financial certification of their ability to meet estimated construction costs and the expenses of operating for a period of one year.[8] In that Rule Making order, the Commission stated:

> . . . In the NPRM we proposed to delete Section 21.17 because we believed that the requirement added to our regulatory burden and was a potential cause of unwarranted delay (for example when financial qualifications were unjustly challenged) without corresponding benefits to the public. . . . We conclude, therefore, that an attestation of the applicant's financial fitness is the most effective way of deterring speculative applications without burdening the applicants and the Commission staff with additional detailed information.

Id. at 5718-19.

As discussed in paragraph 37, pending applications that will be granted after the new rules become effective will be treated as though they had been filed under the new rules. For those applications already containing financial data demonstrating financial ability to construct and operate the proposed facility, we will treat that information as if it were a certification of financial ability under the new rules. Only those applicants whose applications are deficient with regard to this information, and thus subject to dismissal, need file a financial certification statement, as prescribed by the new rules. *Id.* at n. 57. On June 14, 1989, Glab submitted a financial certification. Thus, he has now satisfied the requirements of Section 21.17.

9. Having carefully considered all the pleadings and the evidence submitted by the parties, we find that Microband's allegations, when read in conjunction with the remainder of the record, are insufficient to raise a substantial or material question of fact. Accordingly, the petition to deny filed by Microband will be denied.

10. *Ordering Clause*. Accordingly, IT IS ORDERED that the Petition to Deny filed by Microband Corporation of America IS HEREBY DENIED.

11. This order is issued pursuant to Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, and is effective on its release date. Petitions for reconsideration pursuant to Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, or applications for review pursuant to Section 1.115 of the Commission's Rules, 47 C.F.R. § 1.115, may be filed within thirty (30) days of the date of public notice of this order. *See* Section 1.4(b)(2) of the Commission's Rules, 47 C.F.R. § 1.4(b)(2).

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief
Domestic Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] In its Petition to Deny, Microband incorporated by reference the pleadings it filed in *Sherry Rullman and Edna Cornaggia*, 2 FCC Rcd 2011 (1987).

[2] The eleven other applicants are Warren Ache, Jody Barnes, Edna Cornaggia, Stephanie Engstrom, Jack G. Hubbard, Joseph W. Hubbard, Theodore D. Little, Kevin Rullman, Steven Rullman, Sherry Rullman, and David Wiechman.

[3] A substantial fact has been defined as a fact for which "the totality of the evidence arouses a sufficient doubt on the point that further inquiry is called for." *Jazz*, 775 F.2d at 395.

[4] Microband argues that an undisclosed real-party-in-interest was the applicant for more than one MMDS application in Colorado Springs. If true, there would exist violations of both of these rules. *David Laustsen and Broad - cast Data Corp.*, 3 FCC Rcd at 2054.

[5] Section 21.13(a) of the Commission's Rules, 47 C.F.R. § 21.13(a), requires that an applicant must fully disclose the real-party-in-interest to the application.

[6] Section 21.901(d)(2) provides:

> The E-group channels will be assigned to a single applicant in each area and the F-group channels will be assigned to a different applicant in that area. In such areas, each applicant may submit only a single application for either the E-group channels or the F-group channels but not both. The partners, owners, trustees, beneficiaries, officers, directors or stockholders holding more than one percent of an entity's stock, or any other person or entity holding a similar cognizable interest in the applicant for, or the licensee of, one group of channels in any area, shall not have a cognizable interest in the applicant for, or licensee of, either the same group, or the other group of channels in the same area.

[7] We note that Microband failed to submit an affidavit to support its allegations pursuant to 47 U.S.C. § 309(d)(1). And, Microband did not provide the amount of specific facts to substantiate its allegations as provided by Astroline against the Arch transfer application in *Astroline*, 857 F.2d at 1556. A petition to deny "must show the necessary specificity and support; mere conclusory allegations are not suffficient." *Beaumont*, 854 F.2d at 507.

[8] It should be emphasized that the financial certification requirement does not abrogate the requirement that an applicant must demonstrate that it is financially qualified. However, the new Section 21.17 changes only the manner in which such demonstration is made.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Application of

Multi-Point Television
Distributors, Inc.

For Authority to Construct and Operate a Multichannel Multipoint Distribution Service station on the E-group channels at Champaign, Illinois — File No. 9585-CM-P-83

ORDER ON RECONSIDERATION

Adopted: January 22, 1990; Released: January 25, 1990

By the Chief, Common Carrier Bureau:

1. This matter concerns a petition for reconsideration of the dismissal by the Domestic Facilities Division (the Division) of the application of Multi-Point Television Distributors, Inc. (Multi-Point) to construct and operate a Multichannel Multipoint Distribution Service (MMDS) station on the E-group channels at Champaign, Illinois and for reinstatement of the application.

I. BACKGROUND AND CONTENTIONS

2. As the result of a lottery held on July 28, 1986, Multi-Point's application was selected for qualification review. Subsequently, the Commission's staff conducted such a qualification review of this application pursuant to Section 21.32 of the Commission's Rules, 47 C.F.R. § 21.32. Upon examination, this application was found to contain several deficiencies that precluded the staff from making a finding that Multi-Point was legally, technically, financially, and otherwise qualified, and that a grant of the application would serve the public interest. By letter dated September 26, 1986, Multi-Point was notified of these deficiencies[1] and provided an opportunity to cure them within thirty (30) days. In this deficiency letter, Multi-Point was also advised that failure to file the requested information within thirty days of September 26, 1986 could result in the dismissal of its application.

3. Multi-Point failed to respond to the Division's request for information. Consequently, by letter dated June 12, 1987, the Division informed Multi-Point of its decision to dismiss, without prejudice, the above-referenced application pursuant to Sections 1.46(a) and 21.28(d) of the Commission's Rules, 47 C.F.R. §§ 1.46(a) and 21.28(d), for failure to comply in a timely manner with the Division's request for information.

4. On June 18, 1987, Multi-Point proferred application amendments to cure some, but not all, of its application's deficiencies. Deficiencies which remained outstanding were the absence of: (a) a lease or lease option agreement; (b) current financial data (applicant had submitted information for 1983); and (c) a Section 21.902(i) non-interference analysis.

5. On August 26, 1987, approximately 75 days after dismissal of the application, Multi-Point submitted an "informal" request to reinstate the application. On August 28, 1987 and September 13, 1988, Multi-Point submitted additional arguments in favor of reinstatement. Despite Multi-Point's acknowledgement that there were still deficiencies to be cured in the application, it maintained that reinstatement of the application would be in the public interest because after the dismissal: (1) it had cured some of the outstanding deficiencies; (2) it was "nearly ready to begin construction of this station"; and (3) it had found a programmer-customer who was interested in constructing the MMDS station and in leasing transmission time and capacity from Multi-Point. It also argued that reinstatement would avoid further delay in the initiation of MMDS in Champaign.

II. DISCUSSION

6. Multi-Point admitted that its petition for reconsideration and reinstatement, submitted approximately 75 days after the application was dismissed, was untimely filed. Although it does not dispute the untimeliness of its filing, Multi-Point argues that "the most salient" reason for the untimely filing was that its consultant moved from Arizona to Illinois in May, 1987 and experienced substantial delays in the forwarding of his mail.[2] In addition, Multi-Point claims that it did not have to file the information requested during the specified time period because it believed that the Commission would automatically reinstate applications dismissed for failure to respond in a timely fashion to deficiency letters, if the requested information was finally submitted within thirty days following dismissal.[3]

7. In accordance with Section 1.5(b) of the Commission's Rules, 47 C.F.R. § 1.5(b), Multi-Point had the burden to make any necessary arrangements to assure timely response to Commission correspondence. Thus, any delay in responding to the request for information allegedly attributable to delays experienced by Multi-Point's consultant in the forwarding of his mail is insufficient justification for reconsideration and reinstatement. *Fortuna Systems Corp.*, 3 FCC Rcd 5122, 5123 (Comm. Car. Bur. 1988).

8. Section 405 of the Communications Act of 1934, as amended, 47 U.S.C. § 405 (1983), prescribes that petitions for reconsideration "must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of." Section 1.106(f) of the Commission's Rules, 47 C.F.R. § 1.106(f), establishes that a petition for reconsideration must be filed within 30 days from the date of the Division's dismissal letter, as that date is defined in Section 1.4 of the Commission's Rules, 47 C.F.R. § 1.4. Because the time period for filing petitions for reconsideration is prescribed by statute, the Commission may not ordinarily waive or extend the filing period. *Reuters Limited v. FCC*, 781 F.2d 946 (D.C. Cir. 1986)(" . . . we conclude that the Commission acted beyond its lawful authority when it entertained the belated petition for reconsideration."); *Fortuna Systems Corp.*, 3 FCC Rcd 5122, 5123 (1988); *Metromedia, Inc.*, 56

FCC 2d 909 (1975).[4] Due to Multi-Point's failure to comply with this filing deadline, the petition for reconsideration is properly dismissed.

9. Even if the petition for reconsideration had been timely filed, it would be denied. As of the date of the Division's dismissal action, and again, as of the deadline for filing a petition for reconsideration, Multi-Point still had not submitted the information necessary for our evaluation of its qualifications to be an MMDS licensee.[5] For example, Multi-Point had not submitted a lease, lease option agreement, or other "concrete evidence" to demonstrate the availability of its proposed transmitter site as required by Section 21.15(a) of the Commission's Rules, 47 C.F.R. § 21.15(a). *See Revision of Part 21 of The Commission's Rules*, 2 FCC Rcd 5713, 5721 (1987)("A license will not be granted . . . until concrete evidence of site availability is submitted.").

10. In addition, Multi-Point failed to comply in a timely manner with the request to submit a Section 21.902(i) non-intereference analysis. A Section 21.902(i) non-interference analysis must demonstrate, prior to receiving a construction authorization, that the proposed facilities will not cause harmful interference to existing co-channel or adjacent channel Instructional Television Fixed Service (ITFS) receiver locations within 50 miles of the MMDS transmitter, or an interference-acceptability statement from the affected ITFS licensee. By the express terms of this rule, an MMDS applicant must submit this non-interference analysis at such time as the Commission requests it. Despite the specific request for this analysis in the 1986 deficiency letter, Multi-Point failed to submit by the time specified the requested analysis.

11. Multi-Point also failed to comply with the request to submit *current* data to demonstrate its financial qualifications to construct and operate the proposed MMDS station in violation of Section 21.28(d). At the time of dismissal, Division staff lacked any information as to Multi-Point's financial qualifications.

12. Finally, Multi-Point had a duty to submit curative amendments to its application within thirty days of September 26, 1986, or to seek an extension of time. Its failure to do so for more than eight months substantially impeded the expeditious offering of MMDS at Champaign. Also, Multi-Point's failure to respond in a timely fashion to the Division's information requests hindered the discharge of the Commission's statutorily-imposed duties under Title III of the Communications Act. *See e.g., By Direction of the Commission Letter to US West*, 60 Rad. Reg. 2d 8 (1985). (With regard to the failure to timely submit the complete US West/MCI antitrust litigation settlement agreement, the Commission stated: "The Communications Act manifests a congressional view that the FCC must have full access to relevant information . . . . The statutory plan is not for carriers to determine what information is to be furnished and when. It is for this Commission to do so. The FCC is a relatively small, overburdened agency. If it does not receive full cooperation from its regulatees when it needs relevant information, it cannot discharge its statutory responsibilities.") Therefore, we conclude that dismissal of this application for failure to comply with the Division's requests for information was proper. Reconsideration of that action is not warranted, and reinstatement of the application is not justified.

III. ORDERING CLAUSES

13. Accordingly, IT IS ORDERED that the petition for reconsideration and reinstatement filed by Multi-Point Television Distributors, Inc. regarding its Champaign MMDS application IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] The deficiencies cited were the absence of: (1) a public interest statement pursuant to 47 C.F.R. § 21.13(a)(4); (2) a lease or lease option agreement pursuant to 47 C.F.R. § 21.15(a); (3) current financial data pursuant to 47 C.F.R. § 21.17(b); (4) a non-affiliation statement pursuant to 47 C.F.R. § 21.900; (5) tariff information pursuant to item 29 of FCC Form 435 (*see* 47 C.F.R. § 21.13(a)(3)); (6) a local maintenance system plan pursuant to item 24 of FCC Form 435 (*see* 47 C.F.R. § 21.13(a)(3)); (7) the information required by pages 5, 6, and 7 of FCC Form 435 (*see* 47 C.F.R. § 21.13(a)(3)); (8) an analysis of how the applicant intends to avoid cochannel interference in adjacent areas pursuant to 47 C.F.R. § 21.901(d)(7); and (9) a Section 21.902(i) non-interference analysis.

[2] Multi-Point does not present any argument to justify its delay in responding from September, 1986 until May, 1987.

[3] Multi-Point provides no support for its claim. Multi-Point failed to meet its own reinstatement criteria because the requested information concerning site availability, financial qualifications, and the non-interference demonstration was not submitted within thirty days following dismissal.

[4] There is a narrow exception to this reconsideration filing deadline when it has been demonstrated that there was an error in the Commission's notice. *Gardner v. FCC*, 530 F.2d 1086 (D.C.Cir. 1976); *Amendment of Section 73. 202 (b), Table of Assignments, FM Broadcast Stations*, 78 FCC 2d 1208 (1980); *American Broadcasting Co., Inc.*, 86 FCC 2d 1 (1981). There has been no allegation of error in Commission notice with regard to this dismissal action. Thus, Multi-Point does not qualify for treatment pursuant to this narrow exception.

[5] Multi-Point also claims that its delay in responding to the deficiency letter was, in part, due to the time and resources it devoted to the resolution of issues raised in petitions to deny filed against its applications in other markets. We do not find this justifies the applicant's delay in responding to the Division's deficiency requests or justifies failure to file a request for an extension of time to submit the requested information.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

VisionAire, Inc. File No. 15553-CM-P-83

For Authority to Construct and Operate
a Multichannel Multipoint Distribution
Service station on the E-group channels
at Pueblo, Colorado

ORDER ON RECONSIDERATION

Adopted: January 22, 1990; Released: January 25, 1990

By the Chief, Common Carrier Bureau:

1. This matter concerns a petition for reconsideration of the dismissal by the Domestic Facilities Division (the Division) of the application of VisionAire, Inc. to construct and operate a Multichannel Multipoint Distribution Service (MMDS) station on the E-group channels at Pueblo, Colorado and for reinstatement of the application.

I. BACKGROUND AND CONTENTIONS

2. As the result of a lottery held on September 29, 1986, VisionAire's application was selected for qualification review. Subsequently, the Division's staff conducted such a qualification review of this application pursuant to Section 21.32 of the Commission's Rules, 47 C.F.R. § 21.32. Upon examination, this application was found to contain several deficiencies that precluded the staff from making a finding that VisionAire was legally, technically, financially, and otherwise qualified to be a licensee, and that a grant of the application would serve the public interest. By letter dated October 21, 1986, VisionAire was notified of these deficiencies[1] and provided an opportunity to cure them within thirty (30) days. In this deficiency letter, VisionAire was also advised that failure to file the requested information within thirty days of October 21, 1986 could result in the dismissal of its application.

3. By letter dated November 20, 1986, VisionAire provided corrected antenna structure height information; a statement that VisionAire's financial qualifications had not changed materially since April 30, 1983; and a non-affiliation statement. VisionAire did not submit the requested signed lease or option agreement or the requested interference analysis, but stated that it intended to submit this information at some time in the future.

4. Pursuant to Sections 21.13(c), 21.20(d), and 21.28(d) of the Commission's Rules, 47 C.F.R. §§ 21.13(c), 21.20(d), and 21.28(d), and by letter dated August 30, 1989, the Division dismissed, without prejudice, the above-referenced application for failure to comply in a timely manner with the Division's request for information.

5. On September 22, 1989, VisionAire submitted a petition for reconsideration of the Division's dismissal action. Despite its acknowledgement that there were still deficiencies to be cured in the application, VisionAire maintained that reinstatement of the application would be in the public interest because: (1) in November of 1986, VisionAire had advised the Commission that it had started negotiating for a lease or option agreement and had sent letters to two Instructional Television Fixed Service entities to commence the interference coordination process; and (2) it had submitted a lease-option agreement with its petition for reconsideration. It also argued that reinstatement would "expedite the provision of service by avoiding the necessity of re-lotterying these facilities and the attendant delay therewith." VisionAire's Petition for Reconsideration at 3-4.

II. DISCUSSION

6. As of the date of the Division's dismissal action, VisionAire still had not submitted the information necessary for our evaluation of its qualifications to be an MMDS licensee. For example, VisionAire had not submitted a lease, lease option agreement, or other "concrete evidence" to demonstrate the availability of its proposed transmitter site as required by Section 21.15(a), 47 C.F.R. § 21.15(a). For MMDS applications subject to the Commission's lottery proceedings, the Commission decided that a demonstration of reasonable assurance of site availability, as VisionAire submitted here, would be sufficient prior to a lottery. However, once the lottery is held, a fully-executed lease, option agreement or other concrete evidence of site availability must be submitted. *Revision of Part 21 of The Commission's Rules*, 2 FCC Rcd 5713, 5721 (1987)("A license will not be granted . . . until concrete evidence of site availability is submitted.").

7. In addition, VisionAire failed to comply with the request to submit a Section 21.902(i) non-interference analysis. Section 21.902(i) requires MMDS applicants to submit, prior to receiving a construction authorization and at such time as the Commission requests, an analysis demonstrating that the proposed MMDS facilities will not cause harmful interference to existing co-channel or adjacent channel Instructional Television Fixed Service (ITFS) receiver locations within 50 miles of the MMDS transmitter, or alternatively, a statement from the affected ITFS licensee. By the express language of this rule, an MMDS applicant must submit a non-interference analysis at such time as the Commission requests it. Despite the specific request for this analysis in the 1986 deficiency letter, VisionAire failed to submit the requested analysis. *See, Fortuna Systems Corp.*, 3 FCC Rcd 5122, 5123 (Comm. Car. Bur. 1988).

8. VisionAire had a duty to submit curative amendments to its application within thirty days of October 21, 1986, or to seek an extension of time. Its failure to submit curative amendments for almost three years substantially impeded the expeditious offering of MMDS at Pueblo. Also, VisionAire's failure to respond in a timely fashion to the Division's information requests hindered the discharge of the Commission's statutorily-imposed duties under Title III of the Communications Act. *See, e.g., By Direction of the Commission Letter to US West*, 60 Rad. Reg. 2d 8, 9 (1985)(With regard to the failure to timely submit the complete US West/MCI antitrust litigation settlement agreement, the Commission stated: "The Commu-

nications Act manifests a congressional view that the FCC must have full access to relevant information . . . . The statutory plan is not for carriers to determine what information is to be furnished and when. It is for this Commission to do so. The FCC is a relatively small, overburdened agency. If it does not receive full cooperation from its regulatees when it needs relevant information, it cannot discharge its statutory responsibilities.") Because we lack the Section 21.902(i) interference analysis, we are still not in a position to complete our evaluation of VisionAire's MMDS station proposal and its qualifications to be an MMDS licensee. Therefore, we conclude that dismissal of this application for failure to comply with the Division's requests for information was proper, reconsideration of that action is not warranted, and reinstatement of the application is not justified.

III. ORDERING CLAUSE

9. Accordingly, IT IS ORDERED that the petition for reconsideration and reinstatement filed by VisionAire Inc. regarding its Pueblo MMDS application IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTE

[1] The deficiencies cited were the absence of: (1) a lease or lease option agreement, pursuant to 47 C.F.R. § 21.15(a); (2) antenna structure height information, pursuant to 47 C.F.R. § 21.15(c); (3) current financial data, pursuant to 47 C.F.R. § 21.17(b); (4) a non-affiliation statement, pursuant to 47 C.F.R. § 21.900; and (5) a 47 C.F.R. § 21.902(i) non-interference analysis.

Before the
Federal Communications Commission
Washington, D.C. 20554

Gen. Docket No. 89-88

In the Matter of

Inquiry into the Existence
of Discrimination in the
Provision of Superstation and
Network Station Programming

REPORT

Adopted: December 28, 1989; Released: December 29, 1989

By the Commission:

I. INTRODUCTION

1. In the Fall of 1988 Congress amended the Copyright Act,[1] and directed the Federal Communications Commission to conduct three related studies with respect to satellite delivered superstation[2] and network station [3] programming. These studies include: (1) a combined Inquiry and Rule Making to determine the feasibility of imposing syndicated exclusivity on the delivery of this programming,[4] (2) an investigation of the need for a universal scrambling standard for satellite programming[5] and (3) this report on whether and the extent to which there exists unlawful discrimination by satellite carriers[6] against distributors[7] in the provision of superstation and network station programming for private home viewing[8] by earth station ("dish") owners.[9]

2. As the initial step in preparing this report on discrimination, the Commission released a Notice of Inquiry (*Notice)* [10] soliciting comments and requesting information on the issues involved. The focus of the *Notice* was on arrangements between satellite carriers and distributors. Although the Commission required contracts among those entities to be filed, it did not require contracts between satellite carriers and others, such as cable television systems. Based on the record compiled in response to the *Notice*, we have prepared this report and will forward it to Congress.

3. As directed by Congress, the Commission is considering here whether satellite carriers are discriminating unlawfully against distributors in providing superstation and network station programming for private home viewing by earth station owners. These terms are defined by the SHVA. The report does not extend to the distribution of other, non-broadcast station, programming.[11] Moreover, this report does not examine any possible discrimination against end user earth station owners because they are not distributors.[12]

4. In order to ascertain to what extent unlawful discrimination against distributors may exist, in the *Notice* the Commission requested comments on the structure and operation of the distribution market for superstation and network station satellite-to-home programming. The Commission also asked for comments on the standard to apply in determining whether unlawful discrimination exists. In addition, because the legislation makes unlawful discrimination by satellite carriers a violation of the Copyright Act, the Commission specifically asked for comments from the United States Copyright Office on any reported complaints of discrimination as prohibited by the new legislation.

5. In response to the *Notice*, nine entities filed comments.[13] In general, these comments provided information on the distribution of satellite delivered superstation and network station transmissions. In addition, commenters raised issues regarding the nature of the analysis that the Commission should make in its report to Congress. Most satellite carriers argued that the Commission should only compare contractual arrangements between satellite carriers and the various distributors to satellite earth stations. Other parties asserted that we should broaden our inquiry to include comparison of practices by satellite carriers with distributors to practices by satellite carriers with cable system operators who distribute programming to cable subscribers. The commenters also discussed their views on discrimination based on their interpretation of the scope of this proceeding. Congress instructed us to issue a report on unlawful discrimination by satellite carriers "against" distributors of programming to subscribers for home viewing. 47 U.S.C. § 713; 17 U.S.C. § 119 (a)(6), (d). While the statutory language does not define the category of entities that might be receiving more favorable treatment than these home satellite distributors, *i.e.*, the other side of the comparison to be made, the legislative history indicates that cable operators were at least one such category. The House Judiciary Committee stated:

> It should be stressed that subsection 6, by its express terms, only applies to discrimination by satellite carriers against distributors of programming to earth station owners for private home viewing. It does not extend to the distribution of signals to cable television headends. To the extent that it is of probative value, a reviewing court could, however, weigh prices charged for the delivery of signals to cable headends and compare them to prices charged for direct distribution to dish owners in determining whether there is discrimination under the Communications Act of 1934 and the rules of the FCC.[14]

This type of comparison also comports with our general public interest concern over the nature of competition in the satellite cable programming distribution market and the possible negative impact on consumers of any anticompetitive behavior. Our inquiry has produced disturbing evidence indicating the existence of discrimination by satellite carriers against distributors to earth stations in favor of cable operators who distribute to cable subscribers. Because we have determined that this information presents the possibility of a significant problem, we are initiating a subsequent proceeding to determine whether this discrimination is justified, and if not, what remedial action is necessary.

6. We reach the following conclusions in this report:

(a) Satellite delivered superstation and network station programming is accessible to home earth station users both directly from satellite carriers and through a variety of entities servicing them as distributors;

(b) Based on the evidence in this record, there appears to be no general pattern of unlawful discrimination by satellite carriers among the various entities operating as distributors of superstation and network station programming to home earth stations;

(c) Evidence has been submitted indicating that satellite carriers are charging higher rates for programming provided to home dish distributors than rates charged for cable distribution. The record contains little or no information as to the reasons for these differences, making it impossible for us to determine whether the higher rates are just and reasonable. Because this evidence raises serious concerns about the competitive nature of this market, and the impact on consumers, we intend to initiate a further notice of inquiry in order to develop a more complete record on this issue.

II. BACKGROUND

A. *Development of the Satellite Delivered Television Programming Industry*

7. The *Notice* traced the development of the satellite delivered television programming industry, which is summarized only briefly here. In the early 1970's, all earth stations were required to be licensed by the Commission and were not extensively used for reception of television programming.[15] As demand for video programming increased, we authorized cable systems to construct earth stations to receive television programming via satellite and authorized the retransmission of superstation signals for receipt by cable systems.[16] We also set new standards for licensing smaller earth stations and, in 1979, we deregulated domestic receive-only stations, making licensing optional.[17] These actions led to the proliferation of receive-only equipment used by homeowners and, in conjunction with the growth of the cable industry, heightened the demand for satellite delivered programming.[18]

8. As a result of increased use of satellite-to-home receiving equipment, anxiety about legal issues surrounding reception and consumer concerns about programming accessibility, Congress amended the provisions of the Communications Act pertaining to unauthorized reception.[19] These amendments made it clear that the prohibition against unauthorized reception applied to private home reception of encrypted programming.[20] Questions were raised whether encryption activities with respect to secondary transmission of broadcast programming exposed firms carrying this programming to copyright liability. In June 1986, Congress requested the Commission, in conjunction with NTIA, to initiate an investigation to determine the potential effect of scrambling on home dish owners.[21] In considering the background of the report we are submitting here, it is useful to review the findings the Commission made in this previous study.

9. The Commission's general conclusions in the *Scrambling Inquiry* in areas relevant to the inquiry here were that the market for satellite delivered programming was developing competitively and that there was no reason, at that time, for government intervention.[22] The record compiled indicated that programming, including superstation programming, was accessible by home dish owners and that prices for this programming were comparable to, or lower than, prices charged to cable subscribers.[23] With respect to distributors, the scrambling report indicated that there was evidence in the record to suggest that the industry has an adequate number of distributors.[24] After examining the supply and demand factors influencing retail programming prices, the report concluded that some factors indicated that prices should be higher for home satellite earth station users while others indicated they should be higher for cable subscribers.[25]

10. With respect to the market for superstation signals, the *Second Scrambling Report* noted that entry into this segment of satellite-to-home programming distribution was relatively easy, that superstation programming was popular among subscribers, and that circulation figures indicated that services offering individual superstations could survive with relatively low subscriber counts and without massive cable carriage.[26] The Report found that cable companies would therefore be limited in exercising any market power they might possess with respect to distribution of superstations.[27] Based on this and other information the Commission concluded that the record did not contain evidence that the cable industry used its market power against the satellite-to-home earth station market and we therefore recommended against price regulation.[28]

B. *The SHVA*

11. After the study on scrambling was completed, Congress adopted the Satellite Home Viewer Act (SHVA). The SHVA, which prompted our current study, amended the Copyright Act to extend a compulsory copyright license to satellite carriers retransmitting the broadcasting of superstations and network stations to the public for private home viewing and who charge a fee to either the subscriber or to a distributor who then sells the service to a subscriber.[29] This compulsory license allows the satellite carrier to calculate royalties based on a set statutory standard rather than on privately negotiated rates among the parties involved. In clarifying the rights and responsibilities of satellite carriers, the primary purpose of this compulsory license is to assure availability of superstations and network stations to home dish owners. The compulsory license will expire on December 31, 1994, when Congress anticipates that the market will be able to operate without government intervention.[30]

12. The SHVA only applies to secondary transmissions of superstations and network stations as these entities are defined in the legislation. The SHVA makes a distinction between superstations and network stations in that, to avoid copyright liability, the latter can only be retransmitted to households that are not capable of receiving regular over-the-air broadcasts of that network and who have not recently subscribed to a cable system that carries an affiliate of that network.[31]

13. In addition, the SHVA contains a provision, which is the basis of this report, stating that it is an act of copyright infringement for a satellite carrier to discriminate unlawfully against a distributor.[32] Our congressional

mandate is to investigate whether and to what extent there exists unlawful discrimination as described in Section 119(a)(6) of the SHVA.

C. *The Notice of Inquiry*

14. To assist in the preparation of this report, the Commission adopted a *Notice* to solicit comments from a wide range of entities to ascertain the extent to which unlawful discrimination against distributors is present in the distribution of television broadcast programming by satellite carriers. The *Notice* also defined the limits of our investigation, relying on the legislative history of the SHVA which indicated Congressional interest in both price and program accessibility issues.[33] The Commission noted that the issue of distributor access to superstations and network stations is distinct from customer access because it appears end user customers can subscribe to all of the superstations, and in appropriate cases to network stations, by contacting satellite carriers directly using nationwide toll free telephone numbers.[34]

15. The *Notice* also discussed the Commission's current regulatory structure for entities who fit the definition of satellite carrier. It stated that some satellite carriers may be common carriers who are subject to forborne regulation because they have been determined to lack sufficient market power to have the ability to charge unreasonable rates.[35] The *Notice* observed that other satellite carriers may be non-common carrier licensees or non-licensees that have instead leased satellite capacity on facilities operated by other licensees. Because the term "unlawful discrimination" was not defined in the SHVA, the Commission sought to apply existing Commission policy in an effort to help define this term. It noted that the term "discrimination" was limited in the legislative history to discrimination within the Commission's jurisdiction pursuant to the Communications Act.[36] It was therefore determined that the standard in Section 202(a), which only applies to common carriers, would be used as the basis for comments submitted in this inquiry.[37] The *Notice* also specifically asked about the propriety of applying this discrimination concept to non-common carriers.[38] However, in doing so, it reiterated that the study was concerned with violations of Section 119(a)(6) of the Copyright Act. The *Notice* stated that if the Commission were to enact any new regulations to address discrimination by satellite carriers against distributors, it would be necessary to redefine unlawful discrimination in the context of that statute.[39] Additionally, the *Notice* requested information on the extent of unserved areas for network station service.

III. FINDINGS

16. We have considered the issue of whether and the extent to which unlawful discrimination exists against distributors by satellite carriers in the provision of network station and superstation programming. Our inquiry is limited by the entities to be examined, the programming involved, and the receiving technology employed. Within these parameters, the report of our investigation is as follows.

A. *Operation of the Market*

1. *Entities Involved*

17. Comments in response to the request for information about the network station and superstation satellite-to-home market identified the entities involved. Four commenters responded to the *Notice* stating that they were operating as satellite carriers as this term is defined in the SHVA. These include Southern Satellite Systems (Southern), Eastern Microwave, Inc. (Eastern), Superstar Connection (Superstar), and Netlink USA (Netlink). A fifth commenter, National Rural Telecommunications Cooperative (NRTC), identified itself as a distributor.

18. Southern, a licensee with common carrier licenses, states that it uplinks and distributes the signal of superstation WTBS from Atlanta, Georgia. It markets this signal to home earth stations both directly and through distributors. Subscribers can receive WTBS directly by calling a central telephone number for authorization to receive the service. Southern also offers the signal through distributors, as defined in the SHVA, with whom it has contracted. In addition, Southern states that its distributors also can contract with earth station equipment dealers for the right to market the WTBS service. Southern states that in the Summer of 1989 it had approximately one hundred distributors and that, in light of numerous requests, it anticipates contracting with many more distributors by the end of 1989.[40]

19. Eastern, also a licensee with common carrier licenses, states that it retransmits the signals of superstations WWOR from New York, New York and WSBK from Boston, Massachusetts. It does not currently market its service directly to home earth station owners but contracts with several distributors to perform this function. These distributors include HBO Marketing, Inc. (HBO); Netlink USA (Netlink); United Video, Inc. (United Video); Tempo Development Corporation (Tempo); National Programming Service (National Programming); New Channels Satellite Sales Corporation (New Channels) (an affiliate of Eastern); Cox Communications (Cox) (pursuant to an oral agreement); and Turner-Vision, Inc. (Turner). Eastern markets WWOR and WSBK as a package. It describes its distributors as diverse entities: HBO is a distributor of premium pay services that offers a package of programming to earth station owners; Netlink, United Video, and Tempo also distribute satellite broadcast services; National Programming is an independent company that sells programming to dish owners; and New Channels, Cox and Turner are operators of cable television systems also active in the satellite-to-home earth station distribution market.[41]

20. Superstar, which does not hold any Commission licenses in its name, states that it is an entity formed as a result of a joint venture between United Video (a common carrier licensee) and Merchandising Productions, Inc., a subsidiary of Amway Corporation. It has been assigned the earth station business and contracts of both entities.[42] Superstar provides the signals of six superstations: WGN-Chicago, Illinois; WPIX-New York, New York; KTVT-Dallas-Ft. Worth, Texas; KTLA-Los Angeles, California; WWOR-New York, New York; and WSBK-Boston, Massachusetts. It offers these stations along with other, non-broadcast programming directly to subscribers via a nationwide toll-free number. Superstar also contracts with a large number of distributors who in turn sell to dish owners.[43]

21. Netlink describes itself as a "private" satellite carrier and does not hold any Commission licenses for satellite facilities. It provides the signals of three network television stations from Denver, Colorado directly to home earth station owners in unserved areas. It packages these network stations with other programming. Netlink also states that it provides the signals of an independent station and an educational station licensed in Denver, Colorado as well as superstation WGN of Chicago. Netlink sells programming both through distributors, who then sell to subscribers, and through agents who sell on behalf of Netlink and affiliated cable systems. Netlink also has contracted with two vendors of home satellite equipment to serve as its agents. Netlink states that it is the first satellite carrier to provide network stations to underserved areas.[44]

22. NRTC states that it is an organization composed of 550 rural electric cooperatives and rural telephone systems located in 47 states.[45] It acts as a distributor and contracts with satellite carriers to obtain programming. NRTC offers its service, Rural TV, to home earth station owners. Rural TV includes a package of non-broadcast programming as well as superstation and network station signals. NRTC states that its program package is currently provided to more than thirty thousand households.

23. The record developed in this proceeding demonstrates that there are a variety of participants in the network station and superstation satellite-to-home market performing a variety of functions. For example, some satellite carriers, *i.e.*, Netlink and United Video, also operate as distributors under contract with other satellite carriers, *i.e.*, Eastern. NRTC appears to be the only entity operating solely as a distributor that filed comments in this proceeding. In addition, some cable companies, *i.e.*, Cox, Turner and New Channels, also act as distributors of superstation signals to home earth stations under contracts with satellite carriers, *i.e.*, Eastern. The amount of programming each carrier provides also varies. For example, Southern only provides WTBS while Superstar offers six superstation signals. Finally, some superstations are provided by more than one satellite carrier. For example, both Superstar and Netlink offer WGN-Chicago and both Eastern and Superstar offer WWOR-New York and WSBK-Boston. Netlink appears to be the only satellite carrier offering network station programming.

2. *Technology Involved*

24. It appears that each of the satellite carriers offers programming in a similar manner. To provide superstation and network station programming,[46] a satellite carrier uplinks the broadcast signal from a television station in a scrambled format. The scrambled signal is then retransmitted back to earth from a satellite. The satellite carriers all use the Videocipher II encryption system. This system is also used by all American satellite cable programmers.[47] The Commission concluded in its scrambling inquiry that the marketplace has settled on the Videocipher II as a *de facto* standard.[48]

25. The satellite carriers (as well as the other satellite cable programmers) all make use of a DBS Authorization Center in California to service their home earth station customers.[49] Each satellite carrier must obtain one or more "tier bits." The Videocipher II system currently has 56 tier bits, which are, in essence, electronic "on-off" switches. Each one may be used to control access to a scrambled satellite service or group of services. The DBS Authorization Center receives information from programmers, satellite carriers, and/or distributors on which services each individually-addressed home Videocipher II decoder is authorized to receive. Authorization information for all services utilizing the center is compiled into a single authorization data stream which is relayed back to each satellite service. The service inserts that data stream into its satellite signal. When the satellite signal is received by a home decoder, the decoder becomes authorized. Once the decoder receives the authorization signal on one channel, it becomes authorized for all channels to which the owner has subscribed.[50]

26. Satellite carriers may choose to provide authorization information to the DBS center themselves, to contract with distributors to perform that function, or to employ both methods.[51] Entities that wish to undertake decoder authorization must obtain an activation data link to the DBS center. Moreover, distributors that directly authorize service to home dishes must obtain "tier bit access" from the relevant satellite carrier. Distributors pay a fee to the satellite carrier for access to its tier bit(s). The distributors do not perform any actual transmitting functions, but may provide various marketing services, advertising, billing and collections, and, as noted, authorization and deauthorization of service. The services performed will depend upon contractual arrangements with the satellite carrier.[52]

B. *Accessibility of Superstation and Network Station Programming*

27. A primary question asked by the *Notice* was whether superstation and network station programming is accessible for reception by distributors serving home earth stations. The record here indicates that it is.[53]

28. Network and superstation programming appears to be readily available to both distributors and to home dish owners. NRTC does not assert that it has been unable to obtain superstation or network station programming from any satellite carrier. No other party has alleged that any satellite carrier has refused to deal with any distributor, and the carriers themselves have stated that they contemplate entering into contracts with even more distributors under a variety of terms.[54] In addition, no commenting party has disputed the statement in the Notice that all superstations are available to individual earth station owners by contacting satellite carrriers directly using nationwide toll free telephone numbers.[55] All satellite carriers except Eastern will deal directly with homeowners and the two stations that Eastern carries, WWOR and WSBK, are available directly to home dishes from Superstar.[56]

29. Further, it may be possible for a distributor to become a satellite carrier if it were able to acquire necessary transmission capacity and overcome the not inconsiderable costs. The SHVA resolved any lingering doubts surrounding copyright liability for the retransmission of superstation and network station service by providing for a system of copyright payments.[57] Even if realized, however, this potential does not address the fundamental point of the study, which is whether satellite carriers are engaging in unlawful discrimination.

30. Finally, the supply of superstations is not necessarily limited. Because any station that is not affiliated with a network, *i.e.*, not a network station, is potentially a superstation, satellite carriers could expand their offerings if demand warranted. This is especially true in light of

our previous finding that even a limited subscriber base can support national transmissions of a successful superstation.[58]

C. *Existence of Discrimination Other Than in Accessibility*

31. To enable the Commission to satisfy its congressional directive to determine whether satellite carriers are unlawfully discriminating against distributors, the *Notice* requested that any allegations of discrimination be supported by the submission of specific evidence and documentation. It also requested the United States Copyright Office to provide information regarding any reported complaints of discrimination. Finally, it directed certain satellite carriers that hold common carrier licenses to file a sample of their contracts with distributors.

32. In response to the specific request for information, the United States Copyright Office filed comments stating that it was not aware of any discrimination complaints filed under Section 119(a)(6) of the SHVA. However, after these comments were filed, NRTC filed a complaint with the Copyright Office alleging that certain satellite carriers, including those identified in this proceeding, are unlawfully discriminating against it.[59] On November 28, 1989, the Copyright Office informed Commission staff that it is referring NRTC's complaint to the FCC pursuant to the instant inquiry and for any further disposition. In addition, in its comments, the Copyright Office noted that some concerns have been raised about the concentration of ownership in the entertainment industry. It suggested that in this regard the Commission review testimony given at the hearings conducted by the Communications Subcommittee of the Senate Committee on Commerce, Science and Transportation regarding "Media Ownership Diversity and Concentration" (June 21, 1989). The Commission staff has reviewed the testimony given at these hearings and has found it helpful in providing background information for this report.[60]

33. Eight additional entities, including the satellite carriers and NRTC, filed comments in response to our *Notice*.[61] Six of the original commenters filed replies. When addressing the nature of the discrimination issue, the commenters were divided as to what the Commission should use as a measure for determining whether discrimination by satellite carriers against distributors exists. All commenters who specifically addressed this issue[62] appear to agree that we should compare rates charged by satellite carriers to different distributors to determine if there is discrimination by carriers among the distributors. The four satellite carriers that responded to our *Notice* believe that our analysis should stop here. However, two commenters -- NRTC, a distributor, and AHSA,[63] an association representing home dish owners -- contend that it is necessary for us to go beyond this analysis. According to NRTC and AHSA, in order to determine if there is discrimination against distributors, it is necessary for the Commission to examine the rates charged by the satellite carriers to cable systems and then to compare these rates with the rates charged to distributors. Some satellite carriers objected to this approach, arguing that the SHVA did not contemplate such a comparison. We will address the information in the record relating to both views.

1. *Discrimination Among Distributors*

34. Our determination of whether satellite carriers are discriminating among distributors is based both on the comments filed in this proceeding and the contracts filed by the satellite carriers. Comments filed by the satellite carriers suggest that while they may charge different rates to different distributors, these differences in prices are justified by several relevant factors. Superstar Connection states that these factors include the cost of providing services, the number of subscriptions, the functions the distributors perform, the number of program services provided, the rates in effect when a contract is signed, promotional discounts, the length of the contract term and other factors. According to Superstar Connection, it offers program services to any financially responsible distributor provided it pays the required charges. Superstar states the rates it charges distributors are generally lower than rates it charges for direct service to individual subscribers, thus allowing a profit for distributors.[64]

35. Netlink asserts that in many cases, price differentials may be essential to market efficiency. For example, Netlink asserts that the differences are based on the nature of distribution, the extent of the territory, the number of dish customers a distributor can effectively serve, and whether a distributor can bring efficiencies to the market. Netlink also states that carriers should be allowed to consider past relationships and affiliations to the extent that they offer assurances of integrity of operations by distributors. According to Netlink, carriers need to rely on specific criteria such as existing customer base, presence in the area, billing, existing network of direct to home service and familiarity with the television business when determining rates to be charged.[65]

36. MPAA also appears to believe that different rates to different distributors could be justified. MPAA cautioned the Commission that in considering allegedly discriminatory practices among distributors, it should carefully evaluate whether these practices may be necessary for satellite carriers to execute their copyright obligations under the SHVA. According to MPAA, it may be necessary for carriers to require reliability in prior business dealings, and to inquire whether a distributor holds related authorizations for signal distribution.

37. Both NRTC and AHSA argue that some distributors fare better than others with respect to rates for programming. However, they do not provide any specific evidence to support these assertions.

38. For example, AHSA alleges that certain "not so independent" satellite distributors that also operate as cable companies or that are affiliated with cable companies, such as Netlink, receive preferential treatment by satellite carriers.[66] NRTC raises further questions about inter-related entities. It states that Superstar Connection is partially owned by United Video, a satellite carrier, and is in direct competition with NRTC. Further, according to NRTC, TCI Satellite Sales distributes Southern Satellite's signals. Both are controlled by Tempo Enterprises. TCI Satellite Sales competes directly with NRTC. NRTC further states that Netlink also distributes Southern Satellite's programming through Netlink, USA which is primarily owned by TCI and Western, TCI. Netlink competes with NRTC. NRTC states it is unable to determine the pricing arrangements between these related entities and urges the Commission to investigate if discrimination is being practiced in their favor. NRTC also urges us to determine if the rates charged by one satellite carrier such as Eastern Microwave to another such as United Video are the same as those charged to independent earth station distributors.

39. In addition to the information contained in the comments submitted, three satellite carriers that hold common carrier licenses and that were identified in the *Notice* responded to the request by submitting examples of contracts with distributors. [67] The *Notice* required the carriers to submit a range of contracts, including those with the highest per subscriber rate, the lowest per subscriber rate and a random sample of at least twenty other contracts with rates in between the highest and the lowest.[68] A fourth satellite carrier, Netlink, did not file specific contracts, nor was it requested to do so.[69]

40. The contracts in question were submitted pursuant to a request for confidential treatment under Section 0.459 of the Commission's rules, 47 C.F.R. § 0.459.[70] Accordingly, we will discuss the information contained in these contracts in general terms, without revealing specific information or identifying specific parties included in these agreements.

41. The contracts submitted reveal that different prices are charged to different distributors. The different rates satellite carriers charge distributors appear to depend on a number of factors. These include the number of subscribers a distributor serves, the number of stations' signals the distributor offers, the type of programming the distributor offers, when the contract was negotiated, and the programming with which the purchased network or superstation signal is packaged by the distributor. Some contract terms require that the programming be sold in a package while others stipulate "a la carte" service. Contracts generally contain requirements for marketing and promotion of programming and may stipulate the manner in which this is done. Many contracts contain confidentiality clauses that prohibit disclosure of terms without mutual consent of the parties.

42. Most of the contracts submitted are between two satellite carriers or between a carrier and a distributor who will in turn sell to other distributors or to subscribers. The rates do not appear to differ markedly in either situation.

43. The methods for calculating charges and prices do differ in the contracts submitted to the Commission. Most contracts show that prices to distributors reflect the number of subscribers served by distributors, with lower prices charged for contracts guaranteeing more subscribers. Many contracts also calculate charges and specifically allocate expenses to either the satellite carrier or distributor for operation of the authorization or descrambling system. Most newer contracts specify that the satellite carrier will pay the compulsory copyright fees under the SHVA.

44. Under some contracts, smaller cable systems that also function as home earth station distributors pay more for network and superstation programming than larger, non-cable system distributors who serve more customers. There appears to be no pattern of general rate reductions for cable systems that also serve home earth stations based solely on the fact that they are also cable operators. The contracts also show that there are some special, limited-time promotional contracts between satellite carriers and receiving equipment dealers. Some contracts contain clauses which require a carrier to offer more favorable terms to distributors in the same service area if such terms are negotiated with another distributor in this same service area.

45. One carrier submitted a basic, form contract, which is to have been signed with all distributors after approximately June 1989.[71] This carrier states that it may negotiate lower rates with some high volume distributors, but that this standard contract reflects its current price structure.[72]

46. We conclude that the evidence in this record does not support a finding that satellite carriers are unreasonably discriminating among different distributors to home earth stations, even though the rates charged distributors by satellite carriers vary. Section 202(a)[73] states that it is unlawful for a common carrier to engage in "unjust or unreasonable discrimination" in the provision of "like" communication services or to give any "unreasonable preference or advantage" to any person. In demonstrating a violation of Section 202(a), it must be shown that the services in question are "like" services, that discrimination has occurred, and that any such discrimination is not "just and reasonable."[74] The *Notice* requested commenters to use this standard in their discussions regarding the existence of discrimination, and if discrimination exists, on whether or not it is reasonable. However, we emphasize that we are not making findings regarding violations of Section 202(a) in this report but instead are applying that standard to determine if Section 119(a)(6) of the Copyright Act is being violated.

47. Clearly the services provided by the satellite carriers to the distributors are like services. No commenter disputes this point. Nor does any commenter dispute the fact that there are differences in the rates charged by the satellite carriers to the different distributors. Thus, the only question remaining under the Section 202(a) analysis is whether the discrimination reflected in the different rates is "just and reasonable."

48. As discussed above, the satellite carriers list a number of factors they consider when determining the rates they charge distributors. A review of the contracts demonstrates that these factors do, in fact, provide the basis for different rates charged different distributors.

49. The major factor used in determining rates is the number of subscribers a distributor agrees to provide. For example, a rate per subscriber that is set for a contract in which the distributor guarantees ten subscribers can be higher than for a contract requiring 18,000 subscriptions with a minimum guaranteed payment from the distributor. Discounts for higher subscriber guarantees are reflected in all the satellite carrier contracts that we have reviewed. There is no evidence that the discounts differ depending on who the distributor is. Volume discounts are not *per se* a violation of Section 202(a).

50. Another factor reflected in the rates for services to distributors is the number of stations covered by the rate and whether these stations are sold in a package with other stations or programming or whether they are sold "a la carte." For example, one carrier may sell a package of three stations and a package of four stations. The rate for the latter package is higher but the rate per station may be lower. Stations sold a la carte are more expensive for a distributor to purchase than these same stations would be if sold in a package. This may reflect the fact that distributors can offer package discounts to their earth station customers and thus attract more customers to the service.

51. The contracts also reveal that different rates may be charged by satellite carriers depending on the functions a particular distributor promises to perform in connection with offering service to dish owners. For example, certain contracts provide for lower rates if the distributor is responsible for authorization and deauthorization of service,

billings and collections, advertising or marketing. Again, this type of disparity is legitimate because it reflects a reduction in costs to satellite carriers who are no longer responsible for these activities.

52. Finally, contract rates appear to differ depending on the time when they were negotiated. For example, the rates in several of the contracts signed in 1987 are different from those in contracts signed at a later time. Contracts signed after the SHVA reflect the fact that the statutory copyright fee must now be paid by a satellite carrier for each subscriber, thus increasing its costs to provide service. These rate increases, however, are not substantial, and appear to be based on plausible cost factors. Because the negotiated contract rates are presumably based on the market price current at the time the contract is signed, it does not appear that the rate differences in the contracts negotiated at different times are unreasonable.

53. NRTC and AHSA both complained that certain affiliated distributors, or cable systems operating as home dish distributors, were receiving more favorable treatment from satellite carriers. No specific evidence was submitted to support these claims, and a review of the contracts does not substantiate them. For example, in one contract between a carrier and an affiliated distributor, the rate does not vary significantly from that charged a non-affiliated distributor. Furthermore, smaller cable companies operating as distributors in some instances are charged more than are larger, independent distributors receiving volume discounts. The record does not demonstrate unlawful discriminatory pricing in these situations.

54. Based on all the evidence that has been presented, and applying the type of analysis used under the Communications Act to test for unjust or unreasonable discrimination,[75] we do not find a general pattern of such discrimination practiced by satellite carriers in their business dealings with different types of distributors as that term is defined by the SHVA. Although carriers may charge slightly different rates for their services, there is no evidence these differences are not justified. This finding, of course, does not preclude the possibility that individual instances of discrimination may be taking place and would be subject to a complaint under Section 119(a)(6) of the Copyright Act. Rather, we are responding to the specific request made by Congress with the finding that, based on the information in this record, there is no evidence of a pattern of unlawful discriminatory activity by satellite carriers among distributors.

2. *Existence of Discrimination Against Distributors in Favor of Cable Operators*

55. The Commission has also examined the issue of whether satellite carriers give preferential treatment to cable systems when providing superstation and network programming, thus discriminating against earth station distributors.[76] This issue is distinct from the issue of provision of programming to cable systems that are also functioning as distributors to home earth station owners. It focuses on rates to cable systems for further distribution of programming to cable subscribers via coaxial cable. The primary focus of our discussion above is the relationship between satellite carriers and distributors. To the extent some cable operators also act as distributors, we have included them in the analysis above and found no evidence of unlawful discrimination in favor of these distributors to home dish owners vis-a-vis other distributors. However, we also include in our report our findings on the separate issue of whether satellite carriers, who make their services available to cable operators for redistribution via coaxial cable to customers of the cable television system, might discriminate unlawfully in favor of these cable operators against distributors who offer the services to home dish users.

56. The primary source of information in the record concerning discriminatory wholesale rates charged to home satellite dish distributors versus wholesale rates charged to cable systems for the provision of superstation and network station signals is the comments of NRTC. This information is generally not addressed by the satellite carriers. In making these rate comparisons, NRTC states that its figures are conservative because it is using rates available to a "typical small cable distributor" in its analysis. According to NRTC, these disparities would be much larger if it used large multiple system cable operators in its analysis. NRTC states it is "common industry knowledge" that large multiple cable system operators (MSOs) receive price concessions from satellite carriers who establish rate "caps" that result in a ceiling on payments when a certain subscriber level has been reached. This "cap" can be as low as 250,000 to 350,000 subscribers. According to NRTC, some large MSOs pay to some satellite carriers an effective rate of less than one cent per month per cable subscriber.[77] Using the rates available to small cable systems, NRTC separately analyzes each satellite carrier's rate structure for service to these companies, and compares it to the rates offered by these carriers to NRTC.

57. According to NRTC, Eastern Microwave proposed to charge NRTC rates that exceed the effective cable rates by approximately $1.14 per month per subscription for the signals of WWOR and WSBK. Although NRTC did not, at the time it filed comments, have a contract with Eastern Microwave for service, it bases its allegations of discriminatory pricing on terms offered by Eastern Microwave in a proposed contract that was never consummated. The rate that Eastern Microwave offered NRTC was $1.34 per month per subscriber for the signals of WWOR and WSBK or $.67 per signal.[78] NRTC complains that this rate is greatly in excess of the $.18 to $.20 per month charged for both stations by Eastern Microwave to Satellite Master Antenna Television Systems or cable operators.[79] Eastern Microwave, in a letter to NRTC which is attached to NRTC's comments, responded that the SHVA only applies to discrimination among distributors to earth station users and that rates charged to "other classes of users are irrelevant." Eastern stated that the rate offered NRTC "would effectively be the *lowest* per signal base rate paid by any third-party distributor for WWOR and WSBK."[80]

58. NRTC states that Southern charges NRTC rates that exceed its effective cable rates by approximately $.69 per subscriber. NRTC asserts that Southern's[81] best available monthly rate to NRTC for WTBS is $.79 per subscriber. The rate offered to small cable systems for the same service is, according to NRTC, $.04 to $.10 per month per subscriber.[82] NRTC also states that after the passage of the SHVA, Southern raised its annual rate to distributors by $.70 per subscriber and blamed the increase on the additional copyright costs.[83]

59. According to NRTC, Netlink charges NRTC approximately $2.67 more per subscriber than it charges cable systems for the same five Denver network and superstation signals. NRTC states that Netlink charges

$.58 per month per subscriber to cable systems for the five Denver stations it markets. For the same five stations, NRTC pays $3.25 per subscriber per month, or $.12 per signal vs. $.65 per signal.[84]

60. NRTC states that it has a contract with United Video to distribute the signals of WGN, WPIX, WKTV, KTLA, and WSBK. According to NRTC, this contract contains discriminatory terms and conditions. However, because of a confidentiality clause in this agreement, which United Video has indicated it will enforce,[85] NRTC is constrained not to disclose the specific terms and conditions of the contract.[86]

61. In determining whether the information submitted by NRTC demonstrates unlawful discrimination, the most appropriate test to be applied appears to be the type of analysis used for purposes of Section 202(a). The initial question under that test would be whether the provision of services to cable system operators is like the provision of programming to distributors to home earth stations.

62. As the commenters point out, the analysis of whether services are "like" for purposes of determining discrimination under Section 202(a) is based on the "functional equivalency" test.[87] The inquiry under this test "centers on whether the services are different in any material functional respect."[88] The "linchpin" of the functional equivalency test is customer perception.[89] Although the commenters focused to varying degrees on the perception of the ultimate consumer,[90] *i.e.*, the earth station owner or the cable subscriber, the customers for purposes of this analysis are the home satellite earth station distributor and the cable system operator. Satellite carriers are providing certain satellite delivered television broadcast station transmissions for resale to the consumer. Thus, it is the earth station distributor and the cable operator who must be compared to determine if these services are like. The further resale of this programming to end user subscribers is irrelevant for purposes of this analysis.

63. When services to cable operators and earth station distributors are compared, applying the functional equivalency test, it appears from the limited record before us that these services may well be like as that term is used in Section 202(a). The satellite carrier offers the same programming in a scrambled format, using the same uplink facilities, transponder capacity, radio frequencies, and receiving technology to serve both customers. Although there are differences in the manner in which each entity is served by the carrier, these differences do not appear, on the basis of this limited record, to amount to material functional differences from the perspective of the distributor or cable system operator.

64. The next step in the analysis of possible unlawful discrimination is determining whether different classes of customers are charged different rates for these like services. Our inquiry suggests that cable operators are paying substantially less than distributors to home earth stations for the same programming. Satellite carriers filing comments in this proceeding do not address these disparities.[91]

65. The third step in a Section 202(a) analysis is determining whether there are factors which may justify price differences. Based on the limited record in this proceeding it would be inappropriate for us to come to any definite conclusions about cost justifications. However, although it is undisputed that service to earth station distributors is more costly than service to cable system operators, the limited evidence that is in this record does not support a conclusion that the wide disparities between distributor and cable operator rates have been justified.

66. For example, satellite carriers must pay copyright royalty fees for home dish distributors. This fee, however, is statutorily set at $.12 per subscriber for superstations and $.03 for network stations and does not account for the large differences alleged by NRTC.[92] Other costs associated with the provision of programming to home dish distributors include the costs of a tier bit at the DBS center -- $2851.00 per month -- which can be used with more than one satellite service, and an activation data link which, according to NRTC, should cost no more than $5000.00 per month.[93] NRTC states that when these costs are compared on a per subscriber basis, the extra costs are not significant.[94]

67. Netlink compares costs of serving both markets although it often bases its comparison on end user costs and not on distributor costs. It states that the costs associated with serving home earth stations run approximately $250,000 per year. Netlink does not, however, distinguish which of these costs are associated with its retail distribution directly to dish owners and which are wholesale costs in serving distributors. Netlink also states that NRTC does not bear all costs for DBS Center charges for authorization of services and says that each month it receives some contact from approximately 10 percent of its earth station subscribers including NRTC subscribers, thus increasing its costs in servicing these customers. It distinguishes this situation from service to cable systems where customer problems are handled exclusively by the cable operator. It does not itemize these costs, however.

68. The disparity in rates charged to cable system operators and those charged to earth station distributors are not justified by the information on cost factors contained in the record before us. The satellite carriers have not offered adequate explanations for the higher charges to distributors. However, because the information in this record is limited, we cannot at this time reach a definitive conclusion on the existence of unlawful discrimination in serving these types of customers or on any appropriate remedial action.

69. Our study suggests a problem may exist that requires further Commission consideration. As the Commission stated in the Second Scrambling Report, we do not foreclose the possibility that cable operators are exercising undue market power to the detriment of earth station owners and distributors. As a result of the information compiled in this proceeding, we intend to issue a further Notice of Inquiry in the near future in order to develop a more comprehensive record on this issue. The purpose of this further inquiry will be to determine whether the price differences revealed in this report are just and reasonable and if not, to examine the impact on the competitive nature of this market generally and the welfare of consumers specifically. If indicated, we will explore the possibility of taking remedial action.

IV. CONCLUSION

70. The Commission was directed by Congress to conduct a study of whether and the extent to which satellite carriers engage in unlawful discrimination against distributors in the provision of satellite delivered superstation

and network station programming. Accordingly, based on the record compiled in this proceeding as discussed herein, we have reached the following conclusions.

71. Superstation and network station programming is accessible both to home earth station users and to distributors who sell to home earth station users. Individual homeowners can obtain service by contacting most satellite carriers directly. Distributors can contract with satellite carriers to market these stations to subscribers provided they meet minimal qualifications which do not appear to constitute a significant barrier to entering the distribution business.

72. There does not appear to be a general pattern of discrimination by satellite carriers among the various distributors who market superstation and network station programming that would be unlawful under the SHVA applying the analysis under Section 202(a) of the Communications Act. Although different distributors are charged different rates for service, there is no evidence that these disparities are unreasonable considering other terms and conditions in the contracts.

73. Pricing practices by satellite carriers with cable television systems raise more disturbing questions. The limited record here reveals differences in the rates charged by satellite carriers to home dish distributors and cable system operators. In order to develop a more complete record on the reasons for these differences, and to consider what response might be appropriate, we will initiate a further Notice of Inquiry in the near future.

74. Accordingly, IT IS ORDERED that the Secretary of the Commission shall forward copies of this *Report* to the Senate Committee on Commerce, Science and Transportation and the House Committee on Energy and Commerce.

75. IT IS FURTHER ORDERED that the Motion to Strike Supplemental Comments of Superstar Connection filed by NRTC is denied.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Satellite Home Viewer Copyright Act of 1988 (SHVA), Pub. L. No. 100-667, 102 Stat 3935 at 3949 (1988), amending 17 U.S.C. § 101 *et. seq.*

[2] A superstation is a television broadcast station, other than a network station, licensed by the Federal Communications Commission that is secondarily transmitted by a satellite carrier. 17 U.S.C. § 119(d)(9).

[3] A network station is a television broadcast station that is owned or operated by, or affiliated with, one or more of the television networks in the United States providing nationwide transmissions, and that transmits a substantial part of the programming supplied by the network for a substantial part of the station's typical broadcast day. It includes any translator station or terrestrial satellite station that rebroadcasts all or substantially all of the programming broadcast by a network station. 17 U.S.C. §§ 119(d)(2), 111(f).

[4] *See* Syndicated Exclusivity for Satellite Delivered Programming, 4 FCC Rcd 3889 (1989); 47 U.S.C. § 712.

[5] *See* Inquiry into the Need for a Universal Encryption Standards for Satellite Cable Programming, 4 FCC Rcd 3479 (1989). 47 U.S.C. § 605(f)(g). The encryption standard inquiry deals with all satellite cable programming and is not limited to superstations and network stations.

[6] 47 U.S.C. § 713. A satellite carrier is an entity that uses the facilities of a satellite or satellite service licensed by the Federal Communications Commission, to establish and operate a channel of communications for point-to-multipoint distribution of television station signals, and that owns or leases a capacity or service on a satellite in order to provide such point-to-multipoint distribution, except to the extent that such entity provides such distribution pursuant to tariff under the Communications Act of 1934, other than for private viewing. 17 U.S.C. § 119(d)(6).

[7] A distributor is an entity that contracts to distribute secondary transmissions from a satellite carrier and, either as a single channel or in a package with other programming, provides the secondary transmission either directly to individual subscribers for private home viewing or indirectly through other program distribution entities. 17 U.S.C. § 119(d)(1).

[8] Private home viewing is the viewing, for private use in a household by means of satellite reception equipment which is operated by an individual in that household and which serves only such household, of a secondary transmission delivered by a satellite carrier of a primary transmission of a television station licensed by the Federal Communications Commission. 17 U.S.C. § 119(d)(3). A primary transmission is a transmission made to the public by the transmitting facility whose signals are being received and further transmitted by the secondary transmission service, regardless of where or when the performance or display was first transmitted. 17 U.S.C. §§ 119(d)(4), 111(f). A secondary transmission is the further transmitting of a primary transmission simultaneously with the primary transmission. 17 U.S.C. §§ 119(d)(7), 111(f).

[9] This study was mandated by an amendment to the Communications Act, 47 U.S.C. § 713.

[10] 4 FCC Rcd 3883 (1989).

[11] Premium pay channels such as HBO, Showtime and the Disney Channel and other cable channels such as ESPN and Cable News Network are not superstations or network stations.

[12] *See* note 7, *supra*.

[13] A list of commenters is attached as Appendix 1. We also received a number of letters from members of the National Rural Telecommunications Cooperative (NRTC) in response to our *Notice*. Supplemental Comments were filed by Superstar Connection. A motion to strike these Supplemental Comments or, alternatively, to accept a Supplemental Response was filed by NRTC. We will accept and consider the Supplemental Comments and the Supplemental Response as informal comments in this proceeding.

[14] H.R. Rept. No. 100-887, Part 1, 100 Cong. 2d Sess. at 21 (1988).

[15] *Notice* at para. 4.

[16] *Id.*

[17] *Id.*

[18] *Id.* at para. 5.

[19] Cable Communications Policy Act of 1984, Pub. L. No. 89-549 (1984). *See* Section 705 of the Communications Act, codified at 47 U.S.C. § 605.

[20] Some programmers planned to encrypt their signals prior to 1984.

[21] This investigation was requested on June 12, 1986 during a hearing before the Subcommittee on Telecommunications, Consumer Protection and Finance of the House Energy and Commerce Committee. The Commission complied with this request. *See* Inquiry into the Scrambling of Satellite Television Signals and Access to those Signals by Owners of Home Satellite Dish Antennas, First Report (First Scrambling Report), 2 FCC Rcd 1669 (1987), Second Report (Second Scrambling Report), 3 FCC Rcd 1202 (1988).

[22] *See Second Scrambling Report* at para. 78. The report noted that there were copyright problems, *see id.* at para. 63. However, these problems have now been addressed by the SHVA.

[23] *Id.* at paras. 56 and 78.

[24] *Id.* at para. 51.

[25] For example, earth stations may be more expensive to serve considering the need for individual authorization at the computer authorization center and higher marketing and advertising costs. On the other hand, the dish owner owns his own reception equipment while the costs of the cable distribution plant must be reflected in cable rates. With respect to demand, the report indicated that households with earth stations may have fewer television alternatives and thus may be willing to pay more for programming. *Id.* at para. 55. On the issue of wholesale prices charged to distributors, the *Second Scrambling Report* also found possible efficiency explanations for some differences in prices between cable and home satellite distributors, *see id.* at para. 58.

[26] *Id.* at paras. 53 and 54.

[27] *Id.*

[28] *Id.* at para. 78.

[29] 17 U.S.C. § 119.

[30] H.R. Rep. No. 100-887, Part 2, 100th Cong. 2d. Sess. 13, 15 (1988) (*House Report - Part 2*).

[31] 17 U.S.C. § 119(d)(10) provides that the term unserved household, with respect to a particular television network, means a household that -

> (A) cannot receive, through the use of a conventional outdoor rooftop receiving antenna, an over-the-air signal of grade B intensity (as defined by the Federal Communications Commission) of a primary network station affiliated with that network, and
>
> (B) has not, within 90 days before the date on which that household subscribes, either initially or on renewal, to receive secondary transmissions by a satellite carrier of a network station affiliated with that network, subscribed to a cable system that provides the signal of a primary network station affiliated with that network.

[32] 17 U.S.C. § 119(a)(6).

[33] *Notice* at para. 27.

[34] *Notice* at n. 63.

[35] *Notice* at para. 17. *See also* Policy and Rules Concerning Rates of Competitive Common Carrier Service and Facilities Authorizations Therefor, First Report and Order, 85 FCC 2d 1 at paras. 88-89 (1980) and Fourth Report and Order, 95 FCC 2d 554 at paras. 35 and 38 (1983).

[36] *House Report - Part 2*, *supra* note 30 at 27.

[37] *Notice* at para. 26.

[38] *Id.*

[39] *Notice* at para. 30.

[40] Comments of Southern at 5.

[41] Comments of Eastern.

[42] United Video was one of the common carriers we identified in the *Notice* and directed to submit distributor contracts. *See Notice* at para. 22. Superstar responded on behalf of United Video. NRTC challenged Superstar's standing to file these contracts on behalf of United Video. Superstar responds that because it has assumed responsibility for providing United Video's service to home earth stations, it is the appropriate entity to respond to the *Notice*. *See* discussion in Supplemental Comments of Superstar and Supplemental Response of NRTC.

[43] Comments of Superstar.

[44] Comments of Netlink. Another entity, Satellite Broadcast Network, apparently provides network station programming but did not file comments in this proceeding. *See* Second Scrambling Report at paras. 68-69.

[45] Approximately 118 NRTC members submitted letters in response to the *Notice*.

[46] The technical discussion herein is based in part on Comments of NRTC at 28-31.

[47] *E.g.*, Home Box Office, ESPN, Cable News Network.

[48] *See Second Scrambling Report* at para. 16. However, some individual pay per view events are encrypted with other technologies.

[49] The center is operated by General Instrument Corporation, the Videocipher II patent holder, on a cost sharing basis. The basic authorization technology is the same for cable headends and home earth stations. However, when providing service to a cable headend, the satellite carrier performs the authorization function itself at its uplink facility. This permits cable systems that subscribe to the carrier's service(s) to receive unscrambled programming for retransmission to the cable systems' customers. Only one authorization function needs to be performed by the satellite carrier for each cable system.

[50] Home earth station decoders are reauthorized monthly. The reauthorization message for each decoder is transmitted several times each month.

[51] For identification of those carriers which directly serve the earth station market, *see supra* at paras. 17-21.

[52] *See* Comments of Netlink.

[53] *See* notes 2 and 3 *supra* for definitions of superstation and network station. We reach no conclusions about the accessibility of other non- broadcast station programming.

[54] *See, e.g.*, Comments of Southern.

[55] Notice at n. 63.

[56] *See* discussion, *infra*, at para. 20.

[57] Second Scrambling Report, *supra* note 21 at para. 26. The compulsory copyright license for network station service is limited to unserved areas by the SHVA.

[58] *Id.* at paras. 53 and 54.

[59] A copy of NRTC's complaint is attached to its Reply Comments as Exhibit A. *See* Supplemental Comments of Superstar.

[60] Several participants in these hearings testified regarding allegedly discriminatory practices by program suppliers in providing services to technologies other than cable. *See, e.g.*, testimony of Bob Phillips of NRTC, Gene Kimmelman of Consumer Federation of America, and Robert Schmidt of Wireless Cable Association.

[61] One of the eight, Electronic Data Systems (EDS), was concerned that this proceeding could be used as a vehicle to change the regulatory status of a non-common carrier's delivery of business television programming.

[62] Two commenters, the Motion Picture Association of America, Inc. (MPAA) and EDS did not specifically address the discrimination issue or the distinction between cable and earth station distributor rates; the Copyright Office, in addressing discrimination, did not discuss this distinction.

[63] These comments contained a study of the comparison of cable and earth station economics as Exhibit 1. Neither AHSA's comments nor the study attached are specifically directed to superstation and network station programming or to discrimination against distributors as defined in the SHVA. Rather, these comments address satellite programming in general and the concerns of end user earth station owners. *See* Reply Comments of Superstar at 3.

[64] Comments of Superstar at 6.

[65] Comments of Netlink.

[66] Netlink has identified itself in this proceeding as a private satellite carrier that utilizes distributors in delivering superstation and network station transmissions.

[67] Superstar Connection filed contracts on behalf of United Video, Inc. and despite NRTC's assertion to the contrary, we have not been presented with any reason to reject Superstar's representation that these contracts adequately represent the arrangements between United Video and earth station distributors. *See* discussion in Supplemental Comments of Superstar and Supplemental Response of NRTC.

[68] *Notice* at para. 22.

[69] Although Netlink did not file distribution contracts with the Commission, it asserts in its comments that NRTC is the only distributor that receives a volume discount from Netlink and thus its rates are the lowest of all Netlink distributors.

[70] NRTC filed a Freedom of Information Act request for disclosure of this material which was denied. NRTC has filed an Application for Review of this denial which is currently pending.

[71] *See* Letter from Robert Corazzini to Chief, Domestic Facilities Division, June 30, 1989 requesting confidential treatment for the contracts filed on behalf of Southern Satellite.

[72] *Id.*

[73] 47 U.S.C. § 202(a). We did not receive any comments suggesting another standard by which to determine discrimination.

[74] MCI Telecommunications, Corp. v. FCC, 842 F.2d 1296, 1307 (D.C. Cir. 1988). *See also* Ad Hoc Telecommunications Users Committee v. FCC, 680 F.2d 790 (D.C. Cir. 1982); American Broadcasting Companies, Inc. v. FCC, 663 F.2d 133 (D.C. Cir. 1980).

[75] 47 U.S.C. § 202(a).

[76] In addition to the legislative history regarding comparison to rates charged to cable operators and the Commission's independent public interest concern for a competitive program distribution market, members of Congress have expressed interest in this issue. For example, several bills addressing this issue are currently pending. *See, e.g.,* S1698, the Satellite Fair Marketing Act, which would specifically prohibit discrimination in distribution of all scrambled satellite cable programming between home satellite antenna users and cable television subscribers for a period of five years. This bill also directs the Federal Trade Commission to conduct an investigation of the pricing, distribution terms and practices in the market for this programming. S1698 would also prohibit discrimination against distributors.

[77] Comments of NRTC at 32-33. The comments do not indicate whether this is a per station charge or whether it reflects the amount charged for more than one station.

[78] Eastern Microwave does not address these facts in its reply comments. NRTC estimates that this is 600% more than the effective rates charged for cable distribution.

[79] NRTC comments of Exhibit C.

[80] Comments of NRTC, Exhibit D. (Letter from Eastern to John B. Richards, April 19, 1989). Eastern did not address this issue in its comments filed in this proceeding.

[81] NRTC points out that Southern and its parent company are 100% owned by TCI, the largest MSO in the country.

[82] Southern does not address these figures. NRTC estimates that this is 800% more than the cable rate.

[83] Comments of NRTC at 38. The statutory copyright fee is $.12 per *month* per subscriber for superstations and $.03 for network stations. NRTC's comments do not state what Southern's *annual* charges were prior to the rate increase. We note that other rate comparisons are based on monthly rates. If this $.70 rate increase were spread over twelve months it would amount to a $.06 per month increase.

[84] NRTC also points out that TCI, a large cable company, owns 80% of Netlink. Netlink does not address NRTC's figures. NRTC estimates that the rate disparity is approximately 519%.

[85] *See* Comments of NRTC, Exhibit E (Letter from United Video to John B. Richards, June 7, 1989).

[86] NRTC states that this contract was never assigned to Superstar and that United Video remains the contracting party. *See* Supplemental Comments of Superstar, Supplemental Response of NRTC.

[87] *See* cases *supra* note 74. Although the Court of Appeals rejected the way the Commission applied this test in MCI Telecommunications Corp. v. FCC, *supra* note 74, that court did not reject the test itself. *See* AT&T Communications, Tariff F.C.C. No. 12, FCC 89-302, released November 8, 1989.

[88] American Broadcasting Companies, Inc. v. FCC, *supra* note 74 at 138.

[89] Ad Hoc Telecommunications Users Committee v. FCC, *supra* note 74 at 795.

[90] *See, e.g.,* Comments of Netlink, Superstar, NRTC.

[91] We did not receive comments from any party representing cable industry interests.

[92] *E.g.,* $.69 more charged by Southern, $2.67 ($.65 per station) by Netlink.

[93] NRTC estimates that this would be the cost if the link were between New York and California. A link covering a shorter distance might be less expensive. Testimony at the Senate Communications Subcommittee's November 16, 1989 cable oversight hearing suggests that, in addition to monthly costs such as those cited by NRTC, there is a one time capital investment required for participation in the DBS Center.

[94] Comments of NRTC. These costs of $7851.00 per month spread over 100,000 customers would result in an $.08 per month per customer extra cost to serve earth station owners. Spread over 200,000 customers, it would cost an extra $.04 per month per customer. Based on NRTC's statement that it serves 30,000 subscribers, these costs would be $.26 per NRTC customer.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-535

In re Applications of

Vernon R. Baldwin & Billy W. Lanham d/b/a TRI-STATE COMMUNICATIONS — File No. BPH-87033IPD

BROADSTAR COMMUNICATIONS, INC., DEBTOR-IN-POSSESSION — File No. BPH-870408KD

For Construction Permit for a New FM Station, Channel 282A, at Harrison, Ohio

MEMORANDUM OPINION AND ORDER

Adopted: January 9, 1990; Released: January 26, 1990

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

1. Before the Review Board is a Petition for Reconsideration filed pursuant to 47 C.F.R. §1.106, by BroadStar Communications, Inc., Debtor-in-Possession (BroadStar), on December 22, 1989, seeking reconsideration of the Board's *Decision*, 4 FCC Rcd 8258 (1989), denying BroadStar's application and granting the competing application of Tri-State Communications.

2. In reaching the determination that BroadStar's application for construction permit must be denied, the Board declared in pertinent part that (*id.*, at 8259):

> In its exceptions, BroadStar concedes that it is not now financially qualified. BroadStar Exceptions at 9. However, the Commission maintains a bedrock requirement that an applicant "must provide substantial and reliable evidence showing 'sufficient net liquid assets on hand, or committed sources of funds to construct and operate for three months without revenue.'" *Northampton Media Associates*, 4 FCC Rcd 5517, 5519 (1989); 47 U.S.C. §308(b); *Revision of Application for Construction Permit for Commercial Broadcast Station*, 50 RR 2d 380, 388 (1980). Here, the financial qualifications of BroadStar were initially predicated on the availability of a $500,000 loan from Central Trust. But, BroadStar has withdrawn reliance upon that loan, and can only represent that "if BroadStar's principal, Earnest James is successful in transferring BroadStar's application to another entity controlled solely by James," it may *become* financially qualified.

3. It is uncontroverted from BroadStar's instant petition that it is *still* not financially qualified. All BroadStar has now submitted is a copy of its "Fourth Amended Disclosure Statement" (as filed with the bankruptcy court), and an Order of the bankruptcy court approving its plan of reorganization; the latter *expressly contingent* upon (1) a vote of the "creditor's and equity security holders" to accept or reject the plan,[1] and (2) the outcome of a future hearing before the bankruptcy court. Thus, BroadStar can still only speculate as to its potential financial qualifications. And, even assuming, *arguendo*, that the creditors and equity security holders and the bankruptcy court eventually elect/approve the reorganization plan, BroadStar would yet face the hurdle of demonstrating "good cause" to amend its application here by substituting an entirely new entity as the applicant. *See Erwin O' Conner Broadcasting Co.*, 22 FCC 2d 140, 143 (Rev. Bd. 1970).

4. Conversely, we have a fully qualified applicant, Tri-State, who is "ready, willing and able" to construct the facility at issue here. *See Dutchess Communications*, 101 FCC 2d 243, 254 (Rev. Bd. 1985). The public interest will best be served by the prompt institution of new FM broadcast service by Tri-State Communications at Harrison, Ohio.

5. ACCORDINGLY, IT IS ORDERED that the Petition for Reconsideration filed by BroadStar Communications, Inc., Debtor-in-Possession, on December 22, 1989, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Eric T. Esbensen
Member, Review Board

FOOTNOTE

[1] We note in passing that under BroadStar's and Earnest James' stewardship, BroadStar, in its operation of WICN-AM (which occasioned the bankruptcy proceeding), failed to pay taxes to the United States Internal Revenue Service (IRS) from late 1987 until 1989, and currently owes the IRS in excess of $120,000.00. Further, it owes taxes of $24,500.00 to the State of Ohio, and to "other taxing agencies" in excess of $20,000.00. Secured creditors are owed nearly $1,000,000.00, and unsecured creditors in excess of $127,000.00.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-250

In re Applications of

GLOBAL INFORMATION TECHNOLOGIES, INC.	File No. BPCT-861219KG
TEXSTAR COMMUNICATIONS, LTD.	File No. BPCT-870212KM
FRONTIER BROADCASTING, INC.	File No. BPCT-870212KN
FREDERICKSBURG CHANNEL 2	File No. BPCT-870212KP
HAL S. WIDSTEN	File No. BPCT-870212KT
STONEWALL BROADCASTING, INC.	File No. BPCT-870212KU

For a Construction Permit
For a New Televsision Station
Fredericksburg, Texas

MEMORANDUM OPINION AND ORDER

Adopted: January 16, 1990; Released: January 26, 1990

By the Review Board: MARINO (Chairman) and BLUMENTHAL. Board Member ESBENSEN dissenting with separate statement.

1. The Review Board has before it the *Initial Decision*, 4 FCC Rcd 5445 (1989) (*I.D.*) of Administrative Law Judge Edward Luton (ALJ) granting the application of Stonewall Broadcasting, Inc. (Stonewall) for a new television station at Fredericksburg, Texas. Exceptions were filed by Global Information Technologies, Inc., TexStar Communications, Ltd. (TexStar), Fredericksburg Channel 2, and Hal S. Widesten. Stonewall has filed contingent exceptions. Frontier Broadcasting, Inc. failed to file exceptions to the ALJ's denial of its application; therefore, its application will be dismissed pursuant to 47 CFR 1.276(f), for failure to prosecute.

2. Although Stonewall was found by the ALJ to be the superior comparative applicant in this proceeding by virtue of its qualitatively-enhanced 100% integration proposal, it appears, based on the ALJ's findings, that TexStar's comparative proposal may be comparable to Stonewall's. TexStar was awarded 90% quantitative integration credit (it seeks 100%), and its qualitative enhancements include all of the elements awarded to Stonewall, plus minority enhancement which Stonewall lacks. TexStar correctly points out that Commission precedent holds that where, as here, there is less than a 12.5% quantitative difference in fulltime integration proposals, the preference to be awarded under the integration criterion will depend upon the qualitative differences among the applicants. *See Miracle Strip Communications, Inc.*, 4 FCC Rcd 5064, 5066 (1989). Moreover, even more important, TexStar was awarded a moderate to substantial coverage preference over Stonewall. Thus, TexStar may well prevail in this proceeding if found basically qualified. However, after reviewing the *I. D.* in light of the exceptions and replies, the oral argument held November 27, 1989, and our examination of the record, we believe that a question exists concerning TexStar's financial qualifications which must be resolved before TexStar's application could otherwise be granted. We will, therefore, require TexStar to supplement the existing record before we rule on the pending exceptions.

3. Preliminarily, we note that in numerous recent cases, where the exceptions have challenged the financial qualifications of either the applicant prevailing comparatively in the Initial Decision or, as here, an applicant that ranked sufficiently close, prudence indicated that any gaps in the record should be resolved. Thus, where appropriate, both the Commission, *see, e.g., Susan S. Mulkey*, 4 FCC Rcd 5520, 5522 (1989); *see also Opal Chadwell*, 4 FCC Rcd 1215 (1989); *Pepper Schultz*, FCC 87I-065, released June 29, 1987, and the Board, *see, e. g., Colonial Communications, Inc.*, FCC 89R-81, released January 4, 1990; *Coastal Broadcasting Partners*, 4 FCC Rcd 7512 (Rev. Bd. 1989), have sought to avoid an unnecessary remand hearing by requiring that the record be supplemented to eliminate, if possible, narrow or ambiguous questions which do not rise to the level of substantial and material questions of fact, which require a formal hearing. *But see Shawn Phalen*, FCC 89R-82, released January 4, 1990 and *JAM Communications*, 4 FCC Rcd 3754 (Rev. Bd. 1989), where the respective records were disturbed by appreciably more, and where a full remand was legally compelled. *Compare Citizens for Jazz on WRVR, Inc. v. FCC*, 775 F.2d 392, 397 (D.C. Cir. 1985) ("totality of evidence arouses a sufficient doubt on the point" that hearing is required) *with Armando Garcia*, 3 FCC Rcd 1065 (Rev. Bd.) (supplemented financial evidence removed problem), *review denied*, 3 FCC Rcd 4767 (1988). In sum, the Board will call for additional information to eliminate record ambiguities or gaps where the information before it does not indicate that material or substantial questions of fact exist so as to require a formal remand.

4. Here, a narrow question bearing directly on TexStar's financial qualifications arises from review of a letter appended to a motion to enlarge filed by Stonewall on February 18, 1988. That letter, dated April 6, 1987, from Charles D. Lutz, III, President of the North Branch of NBC Bank of San Antonio, Texas, and addressed to TexStar principal Lesvia Guerra-Cox reads as follows:

> Dear Ms. Guerra-Cox:
>
> Thank you for letting me know that Mr. Hector Pedregon will be a general partner in TexStar Communications.

I will be happy to sit down with you and Mr. Pedregon to discuss various ways in which we might be able to assist you in meeting your financial needs.

Best of luck in winning the construction permit for Channel 2.

Sincerely,

Charles D. Lutz, III President

5. Prior to the interjection of that letter, Guerra-Cox had certified in the application filed January 12, 1987 as to TexStar's financial qualifications. She had filed that application as a sole proprietor, doing business as TexStar Communications. Subsequently, on April 7, 1987, the "B" cut-off date, TexStar amended its application to report that Hector Pedregon had joined the applicant and that the applicant was now a general partnership. TexStar's application was amended, once again, on January 4, 1988, to show that it was a limited partnership, and that the former general partnership was now the general partner of the restructured applicant. Each amendment has affirmatively represented that there has been no change concerning TexStar's financial certification. TexStar does not here rely on the April 6, 1987 letter in support of its financial qualifications, but instead bases its financial certification on a earlier letter dated February 10, 1987, from the NBC Bank; this letter is in the record, but with its text entirely redacted. Stonewall argues, however, that Pedregon's deposition testimony reflects that the April 1987 letter merely reiterates the understanding that TexStar reached earlier with the NBC Bank when Guerra-Cox filed the TexStar application, and that Stonewall has therefore made a *prima facie* case that TexStar has never had "reasonable assurance" of the requisite financing to construct and operate the proposed station. It contends that the ALJ erred in failing to add financial and related candor issues against TexStar. *See Memorandum Opinion and Order*, FCC 88M-1514, released May 20, 1988 (financial issue rejected).

6. Suffice it to say that, read one way, the April 1987 letter quoted above could readily be construed to suggest that the Bank (at least from the time Pedregon joined the applicant) is merely indicating a generalized interest in financing the applicant. While "reasonable assurance" does not require a legally binding commitment, or a substantive agreement, *see Multi - State Communications, Inc.*, 590 F.2d 1117, 1119 (1978), a mere generalized "interest" in financing the applicant would fall far short of the requisite "reasonable assurance." *See Capital City Community Interest, Inc.*, 2 FCC Rcd 1984, 1986 (Rev. Bd. 1987); *see also Shawn Phalen, supra*, citing *Jay Sadow*, 39 FCC 2d 808 (Rev. Bd. 1973) as a "good example" of a purported bank loan arrangement. TexStar, however, counters that the sole purport of the April letter was the bank's acknowledgement of Pedregon's new position as a partner of TexStar Communications, and that it continues to rely on the original February 10 bank letter, which, it asserts, contains all of the requisite terms for a loan commitment letter. Procedurally, TexStar had no obligation in the absence of a financial issue to show its financial plan until a competing applicant had met its burden of making a *prima facie* case for adding an issue (*see Priscilla L. Schwier*, 4 FCC Rcd 2659, 2660 (1988), *appeal docketed, sub nom. New Life Evangelistic Center Inc. v. FCC*, No. 89-1256 (D.C. Cir. Nov. 16, 1989)), especially where the bank letter on which it purportedly relies for support of its financial qualifications has not been shown to be inadequate. Nonetheless, with the introduction of the April 1987 letter, it cannot be determined whether the bank considered its original letter (even assuming its sufficiency) outdated, in light of TexStar's subsequent modifications of its ownership structure into a general partnership and, then, into a limited partnership. In this regard, we have a responsibility to "look for fire 'when . . . shown a good deal of smoke.'" *Id.*, quoting *Citizens for Jazz on WRVR v. FCC, supra*, 775 F.2d at 397.

7. TexStar, therefore, is directed to submit to the Board a copy of the original February 10, 1987 bank letter and all documents and related evidence that would support a continuing bank loan commitment, following TexStar's modification of its ownership structure from an individual applicant.

8. ACCORDINGLY, IT IS ORDERED, That TexStar Communications, Ltd. SHALL FILE the documents called for in paragraph 7 within twenty (20) days of the release date of this Order, and,

9. IT IS FURTHER ORDERED, That the competing applicants herein MAY FILE responsive comments within ten (10) days of the date of the filing of the respective documents; and

10. IT IS FURTHERED ORDERED, That the application of Frontier Broadcasting, Inc. (File No. BPCT-870212KN) IS DISMISSED with prejudice.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

DISSENTING STATEMENT OF BOARD MEMBER ERIC T. ESBENSEN

In light of the Board's recently remanded proceedings in *Shawn Phalen*, FCC 89R-82, released January 4, 1990 and *JAM Communications*, 4 FCC Rcd 3754 (Rev. Bd. 1989), it is difficult to fathom the majority's inconsistency and reluctance to remand the instant proceeding, rather than force the examination of additional documents by the Board, with the attendant delay in the resolution of the matter, and the additional costs to the applicants and the taxpayers.

I respectfully submit that there is no "ambiguity" whatsoever in the April 6, 1987 NBC Bank letter submitted by TexStar. It is clear from its face that the bank is willing to only "sit down" and "discuss" with the newly-formed applicant entity how it "might . . . assist" that applicant; no more, no less. Thus, it is manifest that a remand hearing is here legally compelled because substantial and material questions of fact have been raised which, *prima facie*, cast doubt on TexStar's "reasonable assurance" of funds available from the NBC Bank.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CHARTER NETWORK COMPANY, L.P.,
Complainant,

v. File No. E-89-419

CENTRAL TELEPHONE COMPANY,
Defendant.

ORDER

Adopted: January 22, 1990; Released: January 26, 1990

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On September 29, 1989, Charter Network Co., L.P. ("Charter") filed the above-captioned complaint against Central Telephone Company (the "Defendant") seeking reimbursement and "other appropriate relief" for interstate access charges levied by the Defendant against Charter during the period from October 1, 1985 through December 31, 1986. In accordance with Commission rules governing formal complaint proceedings, Defendant's answer to the complaint was due on November 27, 1989, which was timely filed. On December 14, 1989, Charter filed a motion for leave to withdraw its complaint, stating that it does not wish to pursue its claim against the Defendant and is seeking leave to withdraw its complaint with prejudice.

2. On the basis of the statements contained in the Motion, we conclude that there are not presently issues in controversy for the time period covered by the complaint and that this proceeding should be terminated.

3. Accordingly, IT IS ORDERED, pursuant to authority delegated in Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that Charter's Motion for Leave to Withdraw Complaint IS GRANTED, and that the above-captioned proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Hess
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN PIONEER TELEPHONE, INC.
Transferor,

and I-T-C-90-001-TC

APT ACQUISITION CORPORATION
Transferee,

Application for Authority to
Transfer Control of American Pioneer
Telephone, Inc. and for Additional
Section 214 Authority

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: January 4, 1990; Released: January 26, 1990

By the Chief, International Facilities Division:

1. On October 5, 1989, American Pioneer Telephone, Inc. (APTI) filed an application requesting authority to transfer and assign its Section 214 authorizations to resell international switched voice service to APT Acquisition Corporation (APTAC) in connection with the sale of stock of APTI to APTAC. The parties also request additional Section 214 authority to permit resale of the international switched voice services offered by FTC Communications, Inc. (FTCC) pursuant to its Tariff F.C.C No. 1. The application was placed on public notice October 11, 1989. No comments were received.

2. According to the parties, APTAC and the shareholders of APTI executed a Stock Purchase and Sale Agreement (Agreement) on September 14, 1989. That Agreement was subject to termination if it was not closed on or before October 6, 1989. On October 6, 1989, Special Temporary Authority was granted for APTI to transfer its Section 214 authorizations to APTAC for the provision of international switched voice resale services.[1]

3. The parties state that APTI, formerly Execulines of Florida, Inc., is a privately held Florida corporation incorporated in 1983 with revenues of over $11 million in 1988. APTI is engaged primarily in the business of long distance telecommunications in north-central Florida and has its principal offices in Orlando, Florida. APTI currently provides domestic long distance service as a nondominant carrier subject to regulatory forbearance pursuant to the Commission's *Competitive Carrier* [2] policies and is not required to obtain specific Section 214 authorization nor to file tariffs, the parties state. APTI provides domestic long distance service by leasing a mix of telephone services from a variety of underlying carriers. The parties state that since 1986 APTI has operated as an international resale carrier, [3] but APTI does not hold any FCC radio station licenses.

4. According to the parties, APTAC is a newly-formed North Carolina corporation located in Charlotte, North Carolina created to acquire the stock of APTI to develop and expand APTI's service to the public. APTAC is 50 percent owned by Roger H. Henry, Jr. and 50 percent owned by Isham Farnell O'Quinn. APTAC does not hold any FCC radio station licenses. The parties state that control, ownership, shareholders, employees and agents of APTI and APTAC are U.S. nationals and the company is not subject to regulation as a dominant carrier pursuant to policies established in the *International Competitive Carrier* proceeding.[4]

5. Under the transfer of control, the parties state that APTI will become a subsidiary of APTAC and the APTAC shareholders will acquire control of APTI and its Section 214 authorization. The parties state that the effect of the acquisition of APTI by APTAC will increase competition in the interexchange market by enhancing the ability of APTI to compete in the telecommunications industry, thus increasing consumer choice and consumer welfare. The parties also state that they anticipate, under its new ownership and management, APTI will realize significant operational, financial and marketing advantages that will enable it to provide improved and expanded telecommunications service to the public.

6. Upon review of the application, we find that the proposed transfer will offer some benefits to APTI and its customers and will not entail substantial changes in APTI's structure or service. APTI's customers will not be adversely affected by the transactions since service will not be discontinued. As detailed in the application, the management team for the acquired company will be lead by executives experienced in the telecommunications industry, as well as by the experienced principals of APTAC, and will draw on the management systems and resources of affiliated firms owned by APTAC's principals.

7. We must also address the issue of whether the proposed transaction will inhibit competition and thereby be detrimental to the public interest. Section 7 of the Clayton Act proscribes the acquisition of stock, other share capital, or assets of a company by another company "where in any line of commerce in any section of the country" the effect of such acquisition may be "substantially to lessen competition or to tend to create a monopoly."[5] Under Section 11 of that statute, the Commission is empowered to enforce Section 7 in the case of "common carriers engage in wire or radio communications or radio transmissions of energy."[6] The courts have construed this to mean the requirements of Section 11 of the Clayton Act and the applicable provisions of the Communications Act of 1934, as amended, "are satisfied when the Commission seriously considers the antitrust consequences of a proposal and weighs those consequences with other public interest factors."[7] In brief, we are required to consider anti-competitive consequences as one factor in our public interest consideration. In the present instance, both APTI and APTAC are non-dominant carriers and the proposed transaction does not appear to adversely impact the marketplace.

8. We have also reviewed APTI's request to extend its present Section 214 authorization to resell FTCC's international switched voice services set forth in FTCC's Tariff F.C.C. No. 1 and to assign the new Section 214 authorization to APTAC as well. We find the grant of the requested authority will promote competition in the international switched voice services market.

9. In view of the foregoing, we conclude that APTI's assignment of its license to APTAC and the extension of additional Section 214 authority to permit the resale of FTCC's international switched voice services will be in the public interest.

10. Accordingly, IT IS ORDERED that the application of American Pioneer Telephone, Inc. and APT Acquisition Corporation, File No. I-T-C-90-001-TC, IS GRANTED and APTI is authorized to assign its Section 214 authorizations to APTAC.

11. IT IS FURTHER ORDERED that APTI is authorized to provide internationai switched voice services by the resale of the international switched voice services set forth in FTCC's Tariff F.C.C. No. 1 between the United States and those points listed in the tariff, and to transfer this authorization to APTAC.

12. Copies of any operating agreements entered into between the applicant and its correspondents shall be filed with the Commission within 30 days of execution.

13. IT IS FURTHER ORDERED that APTAC shall file a tariff pursuant to Section 203 of the Communications Act of 1934, as amended, 47 U.S.C. Section 203 and Part 61 of the Commissions Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

14. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F. R. Section 43.61 (October 1, 1988)

15. IT IS FURTHER ORDERED that APTAC is limited, under this order, to the provision of international switched voice resale services only.

16. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities
Division
Common Carrier Bureau

FOOTNOTES

[1] *See* ITC-90-001(TC)/T-1 (Qctober 6, 1989).

[2] 91 F.C.C.2d 59 (1982).

[3] *See* File No. I-T-C-86-074, Mimeo No. 4445 (released May 13, 1986) and 3 F.C.C. Rcd. 6576 (1988).

[4] 102 F.C.C.2d 812 (1985), *recon. denied*, 60 R.R.2d 1435 (1986).

[5] 15 U.S.C. Section 18.

[6] 15 U.S.C. Section 21.

[7] United states v. FCC, 652 F.2d 77, 88 (D.C. Cir. 1980).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

EXECULINES, INC.
Transferor,

and I-T-C-90-009-TC

EXECULINES OF THE NORTHWEST, INC.
Transferee,

Application for Authority to
Transfer Control of Executines, Inc.

MEMORANDUM, OPINION AND ORDER

Adopted: January 22, 1990; Released: January 26, 1990

By the Chief, International Facilities Division:

1. On October 18, 1989, Executines of the Northwest, Inc. (Northwest) filed an application requesting authority to acquire the Section 214 authorization of Executines, Inc. (Executines)[1] *nunc pro tunc* in connection with Northwest's purchase of Executines. The application was placed on public notice November 1, 1989. No comments were received.

2. According to Northwest, it inadvertently did not apply for a transfer of Executines' Section 214 authority before or at the time of consummating the purchase because Northwest believed that the Commission had forborne from the regulation of all resale services. Northwest states that it is now well aware of its transfer responsibilities and obligations under the Commission orders, the Commission's Rules and the Communications Act of 1934, as amended, and will abide by accordingly.[2]

3. Northwest states that it was incorporated in the State of Washington on September 19, 1988 and on May 10, 1989 consummated the purchase of Executines with the delivery of a promissory note to Executines dated November 18, 1988. Prior to May 1989, Executines was an unaffiliated Washington corporation providing resale service. Northwest also states that its purchase of Executines was for all of the assets of the business, consisting of certain tangible assets including office equipment, and intangible assets, including customer lists, office leases, switch leases, etc. for cash plus a promissory note.

4. Northwest states that it is a wholly owned subsidiary of Western Tele-Communications, Inc. (WTCI), a Delaware corporation and is neither directly nor indirectly owned by a foreign telecommunications entity. Northwest adds that none of its officers or board members are aliens or employees, agents or representatives of foreign telecommunications entities. Thus, Northwest states it is not subject to regulation as a dominant carrier pursuant to the Commission's policies set forth in *International Competitive Carrier* proceeding. [3] Northwest further states that it is a non-dominant carrier providing interexchange service and that no Hart-Scott-Rodino notification or report is required to be filed in conjunction with the transactions.

5. Northwest states that prior to the transfer, Executines held Section 214 authority for the provision of international switched voice resale services.[4] Northwest's purchase allowed Executines' customers, as well as new customers, to receive the same services authorized to Executines by the Commission, Northwest states. Further, the affiliation of Northwest with WTCI results in greater efficiencies through economies of scale and scope and provides access to additional expertise and experience thereby allowing for enhancement of its competitive position.

6. Upon review of the application, we find that the acquisition has offered some benefits to Executines' customers and has not entailed substantial changes in Executines' service. Although the parties neglected to request authority in a timely fashion of their intent to execute the transfer of Section 214 authority from Executines to Northwest, we do not find that this omission was either willful or knowing.[5] According to Northwest, it filed a new tariff pursuant to Section 61.171 and specified that it would be providing tariffed services of Executines.[6] In light of these circumstances, we find that a grant of the requested transfer *nunc pro tunc* will serve the public interest.

7. We must also address the issue of whether this transaction will inhibit competition and thereby be detrimental to the public interest. Section 7 of the Clayton Act proscribes the acquisition of stock, other share capital, or assets of a company by another company "where in any line of commerce in any section of the country" the effect of such acquisition may be "substantially to lessen competition, or to tend to create a monopoly."[7] Under Section 11 of that statute, the Commission is empowered to enforce Section 7 in the case of "common carriers engage in wire or radio communications or radio transmissions of energy."[8] The courts have construed this to mean the requirements of Section 11 of the Clayton Act and the applicable provisions of the Communications Act of 1934, as amended, "are satisfied when the Commission seriously considers the antitrust consequences of a proposal and weighs those consequences with other public interest factors."[9] In brief, we are required to consider anti-competitive consequences as one factor in our public interest consideration. In the present instance, both Executines and Northwest are non-dominant carriers and this proposed transaction does not appear to adversely impact the marketplace.

8. In view of the foregoing, we conclude that Northwest's acquisition of the Section 214 authority of Executines *nunc pro tunc* will be in the public interest.

9. Accordingly, IT IS ORDERED that the application of Executines of Northwest, Inc., File No. I-T-C-90-009-TC, IS GRANTED and Northwest is authorized to acquire the Section 214 authorization in File No. I-T-C-86-138 from Executines *nunc pro tunc*.

10. Copies of any operating agreements entered into between the applicant and its correspondents shall be filed with the Commission within 30 days of execution.

11. IT IS FURTHER ORDERED that Northwest shall file a tariff pursuant to Section 203 of the Communications Act of 1934, as amended, 47 U.S.C. Section 203 and Part 61 of the Commissions Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

12. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F. R. Section 43.61 (October 1, 1988)

13. IT IS FURTHER ORDERED that Northwest is limited, under this order, to the provision of international switched voice resale services between the U.S. Mainland, U.S. Virgin Islands, Hawaii and Puerto Rico, on the one hand, and Canada only.

14. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities
Division
Common Carrier Bureau

FOOTNOTES

[1] The Section 214 authorization, File No. I-T-C-86-138, Mimeo No. 6573 (released August 26, 1986), permits Executines to resell international switched voice service between the U.S. Mainland, U.S. Virgin Islands, Hawaii, and Puerto Rico, on the one hand, and Canada.

[2] Concurrently with its application for transfer of control of the Section 214 authorizations of Executines *nunc pro tunc*, Northwest sought Special Temporary Authority to continue international switched voice service by resale to the approximately 3,064 residential and business customers of Northwest in Idaho, Oregon and Washington that had been provided by Executines. Special Temporary Authority was granted to Northwest on October 26, 1989. *See* I-T-C- 90-009-TC/T-1.

[3] 102 F.C.C.2d 812 (1985), *recon. denied*, 60 R.R.2d 1435 (1986).

[4] *See* File No. I-T-C-86-138, Mimeo No. 6573 (released August 26, 1986).

[5] *See* 47 U.S.C. 501 (1989).

[6] *See* Executines of the Northwest, Inc, F.C.C. Tariff No. 1 (effective September 22, 1989).

[7] 15 U.S.C. Section 18.

[8] 15 U.S.C. Section 21.

[9] United states v. FCC, 652 F.2d 77, 88 (D.C. Cir. 1980).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

United States Liberia Radio Corporation — File No. C4-88-003-ML

Application for modification of licenses for Stations WQA27, WQB20, WQB23, WQB35, WQB25, WQB39, and WQB29 in the International Fixed Public Radiocommunications Services

MEMORANDUM OPINION ORDER AND AUTHORIZATION

Adopted: January 23, 1990; Released: January 26, 1990

By the Chief, International Facilities Division:

1. On March 8, 1988, the United States Liberia Radio Corporation (USLRC) filed an application for modification of licenses for Stations WQA27, WQB20, WQB23, WQB35, WQB25, WQB39, and WQB29 in the International Fixed Public Radiocommunication Service. The changes involve the replacement of certain transmitting and receiving equipment presently authorized in its permit and license with more sophisticated and technically up-dated equipment.[1] In addition, USLRC seeks a waiver of the Commission's Rules to operate the referenced facilities without a licensed operator on duty.[2]

2. In support of its application, USLRC states the equipment changes involve the replacement of existing transmitting and receiving equipment with updated equipment which permits USLRC to utilize technical improvements to provide a higher quality of service to its customers, while minimizing the risk of interference to other operations. In addition, USLRC requests a waiver of the Commission's Rules to permit the operation of its radio facilities by a non-licensed operator. USLRC contends that it has been unable to obtain qualified, licensed operators in the Akron, Ohio area. USLRC also notes that the solid state radio equipment it utilizes maintains the correct frequency and when the operator needs to change the frequency, he can just dial the selected frequency and the radio equipment will "home in on" and maintain the appropriate frequency.

3. We believe that USLRC's replacement of its present transmitting and receiving equipment will provide a higher quality of service to its customers while at the same time minimize interference with other operations. It is clear, therefore, that the requested changes will improve USLRC's telecommunications service between the United States and Liberia. Moreover, USLRC has presented persuasive arguments for a waiver of the Commission's Rules to utilize the services of a non-licensed radio operator. It's earnest efforts to obtain the services of a licensed operator have been to no avail. In view of the solid state radio equipment currently being utilized, and USLRC's inability to find a licensed operator who will relocate to Akron, Ohio, we find that it is appropriate to grant the requested waiver under these circumstances.

4. In view of the foregoing, it appears that a grant of the captioned application would serve the public convenience and necessity.

5. Accordingly, IT IS ORDERED, pursuant to Section 304, 308, 309, and 319 of the Communications Act of 1934, as amended, that the application of the United States Liberia Radio Corporation, File No. C4-88-003-ML IS GRANTED and USLRC is authorized to:

a. replace certain transmitting and receiving equipment with more sophisticated and technically updated equipment, and

b. operate the referenced facilities without a licensed operator on duty.

6. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Rules may be filed within 30 days of the date of public notice of this order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities
Division
Common Carrier Bureau

FOOTNOTES

[1] On November 17, 1989 the Chief, Enforcement Division, Common Carrier Bureau, issued a Notice of Apparent Liability (File No. ENF-90-02) for violation of the Commission's Rules, e.g. replacement of unauthorized transmitters. 4 FCC Rcd 8167. USLRC paid the imposed forfeiture on December 18, 1989. We believe the sanctions imposed satisfactorily resolve this matter.

[2] On June 30, 1988, the Chief, International Facilities Division, Common Carrier Bureau, granted temporary authority (C4-88-003-T-1) for USLRC to use a non-licensed operator to operate and control its transmitting apparatus located at Akron, Ohio. This temporary authority has been extended until May 1, 1990.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 89-624

In the Matter of

Represcribing the
Authorized Rate of Return
for Interstate Services
of Local Exchange Carriers

ORDER

Adopted: January 4, 1990; Released: January 5, 1990

By The Deputy Chief, Common Carrier Bureau:

1. On December 29, 1989, the Commission released an Order continuing, on an interim basis, the effectiveness of the prescribed 12% overall rate of return for the interstate services of local exchange carriers.[1] The Commission stated that the interim prescription would remain in effect until the Commission completes a rate of return prescription in accordance with Part 65 of its Rules.[2] The Commission also established the pleading cycle for a rate of return prescription proceeding under Part 65 of the Commission's Rules and directed the Common Carrier Bureau to request such additional information as will be needed to create a full record in that proceeding. [3]

2. Section 65.102(a) of the Commission's Rules states that the Chief, Common Carrier Bureau "may require from carriers providing interstate services, and from other participants submitting rate of return submissions, data or studies that are reasonably calculated to lead to a full and fair record"[4] in a represcription proceeding conducted under the Part 65 Rules. Pursuant to §65.102 (a), and at the direction of the Commission in the *Interim Prescription Order*, the Bureau hereby requires carriers subject to the mandatory filing requirements of §65.201 of the Commission's Rules to submit the data and studies listed in the Attachments. These additional submissions shall not be included in the page limitations specified in §65.102.

3. The staff has reviewed the filing requirements of Part 65 and has determined that certain of those requirements would cause carriers to resubmit documents that they filed in the interim prescription proceeding. In order to avoid unnecessary duplication, the Bureau hereby advises carriers that they may incorporate by reference in their initial rate of return submissions in the instant docket, any of the following items that they may have filed in the interim prescription proceeding in CC Docket 87-463: (1) certified copies of State decisions that establish costs of capital for intrastate exchange carrier operations; and (2) SEC Forms 10-Q and 10-K.

4. For the guidance of the parties, the Bureau notes that the represcription proceeding in the instant docket is governed by §§65.1 *et seq.* of the Commission's Rules, as modified by the determinations in the *Memorandum Opinion and Order on Reconsideration* in Docket 84-800 (Phase II)[5] and by the waiver of §65.400 that the Commission adopted in the *Interim Prescription Order*.[6]

5. Accordingly, IT IS ORDERED that carriers subject to the mandatory filing requirements of §65.201 of the the Commission's Rules, 47 C.F.R. §65.201, SHALL SUBMIT the data and studies listed in the Attachments to this Order.

FEDERAL COMMUNICATIONS COMMISSION

Gerald P. Vaughan
Deputy Chief, Common Carrier Bureau

FOOTNOTES

[1] Refinement of Procedures and Methodologies for Represcribing Interstate Rates of Return for AT&T Communications and Local Exchange Carriers, Order, CC Docket Nos. 87-463 and 89-624, FCC No. 89-362 (released December 29, 1989) (*Interim Prescription Order*).

[2] 47 C.F.R. §§65.1 *et seq.*

[3] *Interim Prescription Order*, n.1 *supra*, at ¶¶ 1, 47, 53 and Appendix F.

[4] 47 C.F.R. §65.201(a).

[5] Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Companies, 104 FCC 2d 1404 (1986), *modified on reconsideration*, 51 Fed. Reg. 1796 (January 15, 1986) (*Phase II Reconsideration*).

[6] *Interim Prescription Order* at ¶¶ 47, 54.

ATTACHMENTS

The following two attachments are to be filed on February 16, 1990. Attachment A is to be updated within 30 days after the end of each ensuing month until the issuance of a Sunshine Notice scheduling a meeting in this proceeding. Attachment A may be filed jointly by the subject carriers. Attachment B is to be filed at both the holding and operating company levels by each carrier subject to the mandatory filing requirements of §65.201.

Carriers are required, except where noted, to file both paper and machine readable versions of the attachments. The instructions for the machine readable filing for Attachment A are contained in that attachment. For Attachment B the machine readable version is to be submitted on 5.25" floppy disks, DOS-formatted in Lotus 123 ver. 2.1, or higher format, with one file per table per company.

Attachment A

Attachment A consist of two exhibits, Exhibit A and Exhibit B.

Exhibit A

Exhibit A is to be filed in paper copy format only and will include the following:

Estimates of the cost of equity capital using the "classic" DCF formula adapted in *Phase II Reconsideration* for each company meeting the qualifying criteria (stated below) in each of the following groups: (1) the S&P 400; (2) a group of large electric utilities; and (3) the Regional Holding Companies (RHCs).[1] For quarterly DCF estimates the growth rate will be the average of the monthly Institutional Brokers Estimate System (IBES) median long term growth rates during the quarter. The stock price will be the average of the daily highs and lows for quarter.

The companies to be included in the S&P 400 group are all companies on the Standard & Poors list of 400 large industrials at the time of the estimate.

The companies included in the group of large electric utilities are those companies in the U.S. Department of Commerce's Standard Industrial Classification (SIC) codes 4911 and 4931 and listed on the Standard & Poors Compustat Services, Inc., Primary, Supplementary, or Tertiary Industrial files.

The qualifying criteria for the S&P 400 group and the electric utility group are that the firm must: a) pay quarterly dividends, b) have at least five analyst estimates of long term growth reported by IBES, c) have IBES median long term growth rates less than or equal to 15%, and d) have DCF cost of equity capital estimates exceeding the risk-free rate (10-year US Treasury bonds). Only those companies meeting the above criteria will be shown in this exhibit.

This exhibit will contain the following DCF estimates for each qualifying company for the following time periods:

Quarterly estimates for the years 1980 through 1988 (except for the RHCs which will be quarterly for the years 1984 through 1988).

Monthly estimates from January, 1989 up to the most recent data available. After the initial submission, a monthly update is to be filed within 30 days after the end of each ensuing month until the issuance of a Sunshine Notice scheduling a meeting in this proceeding.

For the S&P 400 and the large electric utilities, the companies are to be ranked in descending order by DCF estimate and divided into four quartiles. The median DCF estimate is to be shown for each quartile. The simple average of the cost of equity estimates for all groupings is to be shown for each time period.

Exhibit B

Exhibit B is to be submitted in both a paper and a machine readable form. The submission will be on 5.25 inch, double density, DOS-formatted disks in Lotus 1-2-3 Ver. 2.1 or higher format.

Exhibit B is to include the underlying data supporting Exhibit A and will include the data for those companies that were excluded by the qualifying criteria set forth in Exhibit A.

For each of the quarterly periods from 1980 through 1983, two Lotus 1-2-3 files will be produced, one for the S&P 400 and one for the large electric utilities. For each of the quarterly periods from 1984 through 1988 and the monthly periods from 1989 to the present, three Lotus 1-2-3 files will be produced to include the DCF estimates for the RHCs in addition to the S&P 400 and the large electric utilities.

The files will include the following for each company in a grouping.

1) Company name.

2) Ticker Symbol.

3) U.S. Department of Commerce's Standard Industrial Classification (SIC) 4 digit code.

4) DCF estimate, if the criteria specified in Exhibit A are met.

5) The average of the daily highs and lows of the firm's common equity shares (adjusted for stock splits) for each month during the period.

6) The current dividend.

7) The current dividend annualized.

8) The IBES high, low and median long term growth estimates for each month during the period.

9) The number of analysts submitting estimates to IBES for each month during the period.

10) The annualized dividend grown by half the long term growth rate.

11) The firm's beta as computed by Standard and Poors.

12) Cumulative net income before interest expense for the preceding four quarters.

13) Cumulative net income available to shareholders for the preceding four quarters.

14) Total average book capitalization for the preceding four quarters.

15) Total average book equity for the preceding four quarters.

16) Footnotes (optional) describing any unusual events (takeover activity, restructuring, etc.).

FOOTNOTE

[1] The "classic" DCF formula can be written as:

COE = Div/Price + Growth,

where COE is the cost of equity, Div is the anticipated next dividend, Price is the amount an investor would have to pay to purchase a share of common stock, and Growth is the long term growth rate the stock is expected to offer.

Table 1
SWITCHING EQUIPMENT

Stored Program Control (SPC) and Digital Switching
by Central Office and Access Lines Served --

	Central Offices			Access Lines		
	Total Number of Offices	Type of Office		Total Number of Lines	Lines Served by	
		SPC	Digital		SPC	Digital
1980						
1981						
1982						
1983						
1984						
1985						
1986						
1987						
1988						
1989						
1990						
1991						
1992						
1993						
1994						

Note: For 1980 to 1989, year-end actual figures are to be shown. For 1990 to 1994, projected year-end figures are to be shown.

Table 2
SWITCHING EQUIPMENT

Equal Access
by Central Office and Access Lines Served

	Central Offices		Access Lines	
	Total Number of Offices	Offices Equipped for Equal Access	Total Number of Lines	Access Lines with Equal Access
1980				
1981				
1982				
1983				
1984				
1985				
1986				
1987				
1988				
1989				
1990				
1991				
1992				
1993				
1994				

Note: For 1980 to 1989, year-end actual figures are to be shown. For 1990 to 1994, projected year-end figures are to be shown.

Table 3
SWITCHING EQUIPMENT

Common Channel Signaling System 7 (CCSS 7)
by Central Office and Access Lines Served

	Central Offices		Access Lines	
	Total Number of Offices	Offices with access to CCSS7	Total Number of Lines	Lines with access to CCSS7
1980				
1981				
1982				
1983				
1984				
1985				
1986				
1987				
1988				
1989				
1990				
1991				
1992				
1993				
1994				

Note: For 1980 to 1989, year-end actual figures are to be shown. For 1990 to 1994, projected year-end figures are to be shown.

Table 4
SWITCHING EQUIPMENT

Integrated Services Digital Network (ISDN)
by Central Office and Access Lines Served

	Central Offices		Access Lines	
	Total Number of Offices	Offices Equipped for ISDN	Total Number of Lines	Access Lines with ISDN
1980				
1981				
1982				
1983				
1984				
1985				
1986				
1987				
1988				
1989				
1990				
1991				
1992				
1993				
1994				

Note: For 1980 to 1989, year-end actual figures are to be shown. For 1990 to 1994, projected year-end figures are to be shown.

Table 5
TRANSMISSION FACILITIES - TRUNKING

Sheath-Miles and Circuit-Miles
by Type of Facility

	Sheath-Miles			Circuit-Miles					
				Copper			Fiber	Radio	
	Total	Copper	Fiber	Baseband	Analog CXR	Digital CXR		Analog	Digital
1980									
1981									
1982									
1983									
1984									
1985									
1986									
1987									
1988									
1989									
1990									
1991									
1992									
1993									
1994									

Note: For 1980 to 1989, year-end actual figures are to be shown. For 1990 to 1994, projected year end figures are to be shown.

Table 6
TRANSMISSION FACILITIES - LOCAL LOOP

Working Channels
by Type of Facility

	Working Channels				
	Total	Copper		Fiber	Other
		Baseband	Analog CXR / Digital CXR		
1980					
1981					
1982					
1983					
1984					
1985					
1986					
1987					
1988					
1989					
1990					
1991					
1992					
1993					
1994					

Note: For 1980 to 1989, year-end actual figures are to be shown. For 1990 to 1994, projected year-end figures are to be shown.

Table 7
TRANSMISSION FACILITIES - LOCAL LOOP

Equipped Channels
by Type of Facility

	Equipped Channels				
	Total	Copper		Fiber	Other
		Baseband	Analog CXR	Digital CXR	
1980					
1981					
1982					
1983					
1984					
1985					
1986					
1987					
1988					
1989					
1990					
1991					
1992					
1993					
1994					

Note: For 1980 to 1989, year-end actual figures are to be shown. For 1990 to 1994, projected year-end figures are to be shown.

Table 8
TRANSMISSION FACILITIES - LOCAL LOOP

Pairs Terminated at the Main Frame
and Fiber to User Access Lines

	Copper Pairs Terminated at Main Frame	Fiber Pairs Terminated at Main Frame	Fiber to User Access Lines
1980			
1981			
1982			
1983			
1984			
1985			
1986			
1987			
1988			
1989			
1990			
1991			
1992			
1993			
1994			

Note: For 1980 to 1989, year-end actual figures are to be shown. For 1990 to 1994, projected year-end figures are to be shown.

Table 9
CONSTRUCTION PROGRAM

Gross Additions per Access Line Gain
and Gross Additions Categorization

	Access Lines	Change in Access Lines	Total Gross Additions	Gross Additions per Access Line Gained	Total Gross Additions for: Modernization	Growth	Replacement
1980							
1981							
1982							
1983							
1984							
1985							
1986							
1987							
1988							
1989							
1990							
1991							
1992							
1993							
1994							

Note: For 1980 to 1989, year-end actual figures are to be shown. For 1990 to 1994, projected year-end figures are to be shown.

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Table 10
SOURCE AND USES OF FUNDS

Year	Funds from Operations: Net Income (a)	Depreciation (b)	Net Def Income Tax (c)	ITC (d)	AFUDC (e)	Sub-total (f)	Funds from Investment Activities: Gross Plt Additions ex AFUDC (g)	Change in Afil Invest (h)	Sub-total (i)	Funds from Financing Activities: Change in Afil Advances (j)	Change Funded Debt (k)	Change Paid in Equity (l)	Div Paid (m)	Sub-total (n)	Adjustments (o)	Net Incr Cash or Cash Eqv (p)
1970																
1971																
1972																
1973																
1974																
1975																
1976																
1977																
1978																
1979																
1980																
1981																
1982																
1983																
1984																
1985																
1986																
1987																
1988																
1989																
1990																
1991																
1992																
1983																
1994																

Note: Columns (a) through (g) are to be filed for the period 1970 - 1994.
Columns (h) through (p) are to be filed for the period 1970 - 1989.

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Table 10 Abbreviations

Def Income Tax Net - Deferred Income Tax, Net
ITC - Investment Tax Credit
AFUDC - Allowance for Funds Used During Construction
Gross Plt Additions ex AFUDC - Gross Plant Additions excluding Allowance for Funds Used During Construction
Change in Afil Investment - Change in Investment in Affiliates
Change in Afil Advances - Change in Advances from Affiliates
Change Funded Debt - Change in Funded Debt
Change Paid in Equity - Change in Paid-in Equity
Net Incr Cash or Cash Eqv - Net Increase (Decrease) in Cash or Cash Equivalents

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Attachment B